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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

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No.

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ACCELERATED TRANSPORT—PONY EXPRESS, INC., ET AL.,
*Appellants*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

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**On Appeal from the United States District Court for the District of Vermont**

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## JURISDICTIONAL STATEMENT

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### THE OPINIONS AND ORDERS BELOW

On March 20, 1963 the Interstate Commerce Commission entered its report and order in *General Increase—Middle Atlantic and New England Territories*, reported at 319 I.C.C. 168, in which it found certain rates for the transportation of property by common carriers by motor vehicle in interstate and foreign commerce unlawful and ordered them cancelled. On No-

vember 12, 1963 the Commission denied reconsideration of that report and order. On March 3, 1964 the United States District Court for the District of Vermont entered its opinion, reported at 227 F. Supp. 815, and on March 30, 1964 its judgment affirming the report and order of the Commission. The opinion and the judgment of the District Court are Appendix A hereto. The report and order of the Commission are Appendix B hereto.

## JURISDICTION

The jurisdiction of the District Court was invoked under Sections 1336, 2284 and 2321 through 2325 of Title 28 of the United States Code, which Sections give the District Courts of the United States jurisdiction to review and set aside orders of the Interstate Commerce Commission and prescribe the procedure for the exercise of that jurisdiction. The jurisdiction of this Court to review the judgment of the District Court is founded on Section 1253 of Title 28 of the United States Code and was invoked by the filing of a notice of appeal from that judgment on March 30, 1964.

## THE RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set forth in Appendix C hereto.

## QUESTIONS PRESENTED

1. Did the District Court err in answering in the affirmative the following question presented to it by Plaintiffs in brief and argument: Can the Interstate Commerce Commission, having instituted an investigation of general increases in the rates of a group of motor carriers to and from all points within a particu-

lar territory (intraterritorial rates) and having found on the record that the increased rates are at a just and reasonable level and properly related to one another, nevertheless direct reductions in such of the rates as are higher than other rates to and from points beyond that territory (interterritorial rates), which other rates were established by different groups of carriers, were not under investigation, and upon which no evidence was adduced?

2. Did the District Court err in holding that a finding of undue preference, prejudice or discrimination is not necessary to sustain the validity of an order of the Interstate Commerce Commission directing the cancellation of intraterritorial rates solely because they were higher for shorter distances than interterritorial rates for longer distances?

3. Did the District Court err in holding that if motor carriers choose to participate in lower interterritorial rates they are bound to arrange to maintain no higher intraterritorial rates?

## STATEMENT OF THE CASE

All Appellants except Middle Atlantic Conference are common carriers of property by motor operating in interstate and foreign commerce at rates required to be filed with and regulated by the Interstate Commerce Commission. Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b, permits common carriers to collectively establish their rates provided the agreements and procedures for so doing are approved by the Commission. Acting under Section 5a some 1,300 motor carriers have banded together as the Middle Atlantic conference, through which agency they establish, publish and file with the Commission their rates for

the transportation of property within Middle Atlantic Territory, between that Territory and New England Territory, and between those Territories and parts of Canada. Middle Atlantic Territory comprises the States of New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia and West Virginia, the District of Columbia, and some few points in the Eastern parts of the States of Kentucky and Tennessee. New England Territory comprises the States of Maine, Vermont, New Hampshire, Massachusetts, Rhode Island and Connecticut.[1]

Middle Atlantic Conference is only one of many agencies by which motor carriers collectively establish, publish and file rates. For example, the New England Motor Rate Bureau performs the same function for carriers operating within New England. The Southern Motor Carriers Rate Conference performs the same function for carriers operating within the South and between the South on the one hand and Middle Atlantic Territory and New England on the other. The Eastern Central Motors Carriers Association performs the same function for carriers operating between Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, Missouri, Oklahoma and Texas on the one hand and Middle Atlantic Territory and New England on the other. It is the existence of these separate agencies, each making rates for their own members in the light of the circumstances and conditions of transportation within their own territories, that gives rise to the present controversy.

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[1] The precise boundaries of Middle Atlantic and New England Territories are defined in footnotes 4 and 5 in the Commission's report in *Class Rates, Middle Atlantic and New England Territories*, 67 M.C.C. 741, 743 (1956).

Middle Atlantic Conference, acting in accord with its procedures approved by the Commission under Section 5a of the Act, affected on January 16, 1961 on behalf of all of its 1,300 members a general increase in virtually all of their intraterritorial rates, i.e., their rates for the transportation of property within Middle Atlantic Territory and between that Territory and New England. The Commission denied requests by shippers that it suspend the increased rates but did set them for investigation. On March 20, 1963 the Commission, having held a hearing and entertained briefs and exceptions to its hearing examiner's recommendations, issued a report and order, Appendix B hereto, in which it found that the carriers were in need of additional revenues and that the increased rates would not produce revenues in excess of that need (App. B, p. 27a). It further found that the increased rates fairly distributed the burden of meeting that need among the various descriptions of commodities and sizes of shipments, and that the increased rates to and from all points within Middle Atlantic Territory and between all points in that Territory and all points in New England were properly related to one another (App. B, p. 15).

However, the Commission noted that some of the increased intraterritorial rates to points at or near the southern and western borders of Middle Atlantic Territory were higher than the interterritorial rates to more distant points beyond those borders. The latter rates were not established by Middle Atlantic Conference, but rather by the Southern Conference and the Eastern Central Association, respectively. Hence, they were not under investigation. Nevertheless, the Commission held the higher intraterritorial rates un-

lawful to the extent that they exceeded the lower interterritorial rates. Its entire discussion of this matter in its report is as follows:

> "A number of instances are shown where the proposed rates are higher to border points within the affected area which are intermediate over the same routes to points outside the area to which lower rates apply. The respondents claim that they are powerless to correct such situations, and suggest that the rates to and from the border points be required as minimum rates to and from the more distant points. *Interterritorial rates are not here in issue.*" (App. B, p. 24a; Emphasis supplied).
>
> * * * *
>
> "With respect to resulting higher rates to border points than to points beyond over the same routes, *obviously, in accord with prior decisions of the Commission, such higher rates would be unlawful,* and we concur in the conclusion of the examiner in this respect that *if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points.* To the extent that such maladjustments occur, the increased rates are unjust and unreasonable.
>
> "We find that the increased rates and charges are just and reasonable, except that where the resulting rates to intermediate points are higher than the rates to more distant points over the same routes, the former are not shown to be just and reasonable. The schedules will be ordered canceled to the extent found unlawful, without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points in the area here considered." (App. B, p. 28a; Emphasis supplied).

On December 17, 1963 Appellants, pursuant to Rule 23(a)(3) of the Rules of Civil Procedure for the United States District Courts, filed a class suit on behalf of themselves and all others similarly situated to enjoin the Commission's order in the District Court for the District of Vermont. On March 3, 1964 that Court, composed of Circuit Judge Waterman and District Judges Gibson and Blumenfeld, held that:

> "There is ample warrant in the evidence and the statute for the findings in the Commission's report. The report on its face clearly expresses and explains the conclusions reached. And, in our view, the Commission's conclusions were not inadequate, immaterial or arbitrary. See *Gilbertville Trucking Co.* v. *U. S.*, 371 U.S. 115, 83 S. Ct. 217, 9 L. Ed. 2d 177 (1962). Accordingly, we sustain the order of the Interstate Commerce Commission and order that the complaint be dismissed." (App. A, p. 11a).

The District Court's erroneous rationale is deceptively simple. It first held that higher rates for shorter hauls than for longer hauls "is so significant an element affecting reasonableness as to make such rates unreasonable on their face." (App. A, p. 6a). Proceeding on that premise, it held that Appellants had the burden of proving that their "increases in rates which would result in a higher rate for a shorter than a longer haul were just and reasonable", and that they had failed to carry that burden notwithstanding the Commission's finding that "increased rates of all the carriers considered as a group in other respects were reasonable." (App. A, p. 8a).

Rejecting Appellants' contention that a finding that the higher rates were unduly preferential or preju-

dicial or unjustly discriminatory was necessary to support the Commission's order, the Court held:

> "Under sub-section 216(a) of the Act, motor carrier rates are required to meet two separate and distinct criteria: First, they must be 'just and reasonable;' and second, they must not result in 'undue or unreasonable preference or prejudice.' The report of the Commission is unmistakably clear that the basis for condemning the higher rates to border points was that the rates to that extent were not shown to be just and reasonable. The Commission did not purport to find that the rates resulted in undue preference and prejudice. *Such a finding was not necessary for the decision reached or to the validity of the order.*" (App. A, p. 10a; Emphasis supplied).

Finally, the District Court held:

> "We agree with the examiner's reasoning concurred in by the Commission 'that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points.' *To the extent that such maladjustments occur, the increased rates are unjust and unreasonable.*" (App. A, p. 11a; Emphasis supplied).

## THE REASONS FOR PLENARY REVIEW

### The Contrast Between Appeal and Certiorari

The District Court's judgment is before this Court upon appeal, rather than upon a petition for a writ of certiorari. The difference between an appeal and a petition for a writ of certiorari is not one of procedure only. It is one that has fundamental substantive consequences. The jurisdiction to review cases upon writs of certiorari "was not conferred upon this court merely to give the defeated party . . . another hearing."

*Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163 (1923). Hence, as this Court has made clear, the denial of a petition for a writ of certiorari means nothing more than that fewer than four members of this Court were of the view that there were, in the words of its Rule 19, "special and important reasons" for considering the merits of the case. *Sunal* v. *Large,* 332 U.S. 174, 181 (1947). A denial does not carry any implication, much less constitute a holding, that the judgment that is the subject of the petition or the statement and application of the law upon which it is grounded is either right or wrong, sound or unsound. See opinions of Mr. Justice Franfurter in *Agoston* v. *Commonwealth of Pennsylvania,* 340 U.S. 844 (1950); *State of Maryland* v. *Baltimore Radio Show, Inc.,* 338 U.S. 912 (1950).

In contrast, the jurisdiction to review cases upon appeal does give the defeated party another hearing. Hence, this Court has no discretion to decline to consider the merits of such cases. It must affirm, reverse, vacate or modify the judgment appealed. Hence, the summary affirmance of a judgment constitutes a holding that it is right. Morevor, the summary affirmance of a judgment that must stand or fall on the particular statement and application of the law on which it is grounded constitutes the approval of that statement and that application of the law. See *National Motor Freight Traffic Association, Inc.* v. *United States,* 372 U.S. 246 (1963), in which this Court supplemented a *per curiam* order of affirmance to make clear that it approved one of two distinct holdings of the District Court but disapproved the other.

We respectfully point to this fundamental difference between an appeal and a petition for a writ of certiorari as having particular significance in this case in view of the broad sweep of the District Court's

opinion and the enlargement of the regulatory authority of the Interstate Commerce Commission it effects. As we will show, it is anything but "manifest that the questions [of statutory construction and of the meaning and application of governing principles established by this Court] on which the decision of the cause depends are so unsubstantial as not to need" plenary consideration (Rule 16, 1(c)).

**The Necessity of Findings of Preference, Prejudice or Discrimination**

The crux of this case is the District Court's holding that:

> "Under sub-section 216(d) of the Act, motor carrier rates are required to meet two separate and distinct criteria: First, they must be 'just and reasonable;' and second, they must not result in 'undue or unreasonable prejudice or disadvantage.' The report of the Commission is unmistakably clear that the basis for condemning the higher rates to border points was that the rates to that extent were not shown to be just and reasonable. The Commission did not purport to find that the rates resulted in undue preference and prejudice. Such a finding was not necessary for the decision reached or to the validity of the order." (App. A, p. 10a)

The question here is whether the "basis for condemning the higher rates [as] not shown to be just and reasonable" is adequate to sustain the Commission's order. That basis was purely and simply a presumption that rates higher for shorter hauls than for longer hauls are unreasonable. This presumption was invoked by both the Commission and the District Court in reliance on the statement in *Patterson* v. *Louisville & Nashville R.*, 269 U.S. 1, 11 (1926), that: "Apart from statutory enactment, it is prima facie unreasonable to charge more for a shorter haul than for a longer haul."

The *Patterson* Case sheds no light on the question whether evidence that the higher rates are themselves reasonable will rebut the presumption. However, the decision of the Court of Appeals for the Fifth Circuit that it affirmed does. That case arose on a complaint to the Commission for reparations grounded on the maintenance by a railroad of through rates higher than the aggregate of intermediate rates in violation of Section 4 of the Act, 49 U.S.C. § 4. The Commission awarded reparations. It said: "Upon the record now before us, we find that, while the rates assailed appear not unduly high, they were unreasonable in and to the extent that they respectively exceeded the aggregates of the intermediate rates subject to the act." The Court of Appeals, affirming a judgment of the District Court reversing the Commission, held that "the presumption [of unreasonableness] arising in ordinary cases, is rebutted, as it is found by the unanimous report of the commissioners that the charge is not unreasonably high." *Patterson* v. *Louisville & Nashville R.*, 2 F. 2d 592, 593 (5th Cir. 1924). The Supreme Court affirmed the judgment of the Court of Appeals on the ground that the only cause of action alleged in the complaint to the Commission was a violation of Section 4. It therefore held that there was "no occasion to pass upon the effect of the finding that the through rates were 'not unduly high'" 269 U.S. at 8.

However, the Commission itself abides the holding of the Court of Appeals in the *Patterson* Case. It holds that the presumption that higher rates for shorter hauls than for longer hauls are unreasonably high is rebutted by a showing that the higher rates are themselves within the zone of reasonableness. See *F. P. Maggioni & Co.* v. *Atlantic Coast Line R.*, 272 I.C.C.

127 (1948). That case, like the *Patterson* Case, was a complaint for reparations based on the maintenance by a railroad of rates to intermediate points higher than its rates to more distant points in violation of Section 4. Although the Commission found that the higher rates to intermediate points were unauthorized departures from Section 4 and therefore unlawful, it denied reparations on the ground that any presumption of unreasonableness arising therefrom "is here rebutted by the fact that the rate to the intermediate point is below a basis recognized as a reasonable maximum by this Commission." 272 I.C.C. at 131. So too, the presumption may be rebutted by a showing that the rate to the more distant point is lower than a maximum reasonable rate. *Oklahoma Portland Cement Co.* v. *M. K. T. R.*, 139 I.C.C. 685 (1928).

We submit that Appellants rebutted any presumption of unreasonableness here. As the Commission said at the outset of its report (App. B, p. 15a, this case was "an investigation . . . into the lawfulness of general increases in motor carrier class and commodity rates, and in rates and charges for accessorial services . . . between points in Middle Atlantic Territory . . . and between Middle Atlantic and New England Territories." As though to emphasize the foregoing, it further said: "Interterritorial rates are not here in issue." (App. B, p. 24a). As the District Court said: "This case originated and was conducted as a general revenue proceeding in which the carriers' needs, as a group, for a general increase in rates were considered by the Commission . . ." (App. A, p. 2a).

The issue in general revenue cases, i.e., the "carriers' needs as a group," is to be resolved under the criteria of the rule of rate making prescribed in Sec-

tion 216(i) of the Act, 49 U.S.C. § 316(i). *Increased Common Carrier Truck Rates In The East,* 42 M.C.C. 633 (1943). This being a general increase case, the controlling criteria in Section 216(i) are "the need, in the public interest, of adequate and efficient transportation service by [the carriers whose rates are at issue] at the lowest cost consistent with the furnishing of such service; and . . . the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management to provide such service." *Increased Common Carrier Truck Rates In The East,* supra, 42 M.C.C. at 650. Under Section 216(g) of the Act, 49 U.S.C. § 316(g), Appellants had the burden of proof on this issue. They therefore went forward with evidence to show that their increased rates met the criteria of Section 216(i). The Commission found that they had carried their burden on this issue when it found that their rates were just and reasonable. Nevertheless, it further found and the District Court agreed, that Appellants had not carried their burden "to show that the proposed increases in rates which would result in a higher rate for a shorter than a longer haul were just and reasonable." (App. A, p. 8a).

The District Court held that there was no "inconsistency between the Commission's finding that higher rates to border points were not shown to be reasonable and its finding that increased rates of all the carriers considered as a group in other respects were reasonable." (App. A, p. 8a). We submit that this holding is plainly erroneous. Its effect is to hold that Appellants could not establish the reasonableness of the intraterritorial rates in issue by showing that they were in fact within the zone of reasonableness, but only by justifying the relationship between the intraterri-

torial rates in issue and the interterritorial rates not in issue. In so holding the District Court failed to differentiate between what it itself recognized as the "two separate and distinct criteria" that rates must meet, namely the criteria for justness and reasonableness and the criteria for absence of preference, prejudice or discrimination. It thereby obliterated what this Court emphasized in *State of New York* v. *United States*, 331 U.S. 284, 350 (1947), namely "the distinction between revenue and rate relationship cases."

The problem in revenue cases is to determine whether the rates under investigation are "below the lowest or above the highest reaches of reasonableness." The problem in rate relationship cases is to determine whether the relationships under investigation result in discrimination or preference or prejudice. *State of New York, supra*, 331 U.S. at 344. Since both the Commission and the District Court held here, in the latter's words, that the question of preference or prejudice "is irrelevant to the issue or proof in this case", it follows that the relationship of the intraterritorial rates under investigation to the interterritorial rates not under investigation was irrelevant. Yet, both the Commission and the District Court held that the intraterritorial rates, although within the zone of reasonableness, were unreasonable solely because of their relationship to the interterritorial rates.

The holding of the District Court squarely conflicts with *State of New York*. In that case the Commission entered into a general investigation of the lawfulness of rail classifications and class rates throughout the United States. It concluded *inter alia*, after exhaustive hearings spanning several years, that the relation be-

tween interterritorial rates to and from points beyond Official Territory and intraterritorial rates within Official Territory resulted in an unlawful preference to Official Territory in violation of Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1).[2] To cure this unlawfulness it prescribed a reduction of 10 per cent in the interterritorial rates and an increase of 10 per cent in the intraterritorial rates. This Court sustained the Commission's order against the contention that increases in intraterritorial rates could be required only upon findings supported by substantial evidence that those rates were below the zone of reasonableness. It held, 331 U.S. at 344-345:

> "*If this were a case of determining whether existing rates passed below the lowest or above the highest reaches of reasonableness, the point might be well taken.* See United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499, 506, 55 S. Ct. 462, 465, 79 L.Ed. 1023. But we do not have here such a revenue problem. *This case presents problems in rate relationships, that is to say, problems of a discriminatory rate structure condemned by § 3(1).* The Commission may remove a discrimination effected by rates even when they are within the zone of reasonableness, if the discrimination is forbidden by § 3(1). As Mr. Justice Brandeis stated in United States v. Illinois Central R. Co., supra, 263 U.S. at page 524, 44 S. Ct. at page 193, 68 L.Ed. 417, the mere fact that one rate is 'inherently reasonable and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice.' The Commission has the power to adjust the rates,

[2] Official Territory is the rail-rate making territory embracing generally that part of the United States east of the Mississippi River and north of the Ohio River.

upwards and downwards, within that zone, in order to eradicate the discrimination. That power is not unlimited; there are standards which control its exercise." (Emphasis supplied).

We submit that the point that was not well taken in *State of New York* is well taken here. In contrast to the case there the case here *is one* of determining whether rates are "below the lowest or above the highst reache of reasonableness." In contrast to the case there in the case here we *do have* a "revenue problem." In contrast to the case there the case here *does not* present "problems in rate relationships, that is to say problems of a discriminatory rate structure." In contrast to the case there in the case here the Commission *did not* purport to exercise its power to "remove a discrimination effected by rates even when they are within the zone of reasonableness." In contrast to the case there in the case here the Commission *did not* exercise its "power to adjust the rates, upwards and downwards, within that zone, in order to eradicate the discrimination."

In *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499 (1935), cited by this Court in the above quoted passage from *State of New York*, the Commission investigated reduced rail rates on coal from certain mines in Indiana to Rockford and Freeport, Illinois. There, as here, it found the rates unreasonable because of their relationship to other rates not under investigation. Specifically, it found them unreasonable because they would "lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act; that they would cause a disruption of the in-

dividual groups from which the rates are proposed; and that they would cause a disruption of the long standing rate relation existing for competitive purposes, between the several Indiana groups." As quoted by the Court, 294 U.S. at 505-506. On these findings the Commission held the rates unreasonable and ordered them cancelled. Mr. Justice Cardozo, speaking for a unanimous Court, held the order invalid for lack of adequate findings supported by sustantial evidence. He said:

> "The statement . . . that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated. There is no suggestion in the report that the rates have been so reduced as to be less than compensatory. True they do not reach the maxima beyond which charges are excessive. On the other hand, they do not pass the minima beyond which charges are too low. A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself. We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute. Interstate Commerce Act, § 15a (49 USCA § 15a). Those tendencies excluded, 'a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise.'" 294 U.S. at 506 (Citations omitted).

Subjecting the Commission's findings to what he called "these tests", Mr. Justice Cardozo pointed out that the disruption of a rate structure "without more is no sufficient reason for prohibiting a change." 294 U.S. at 507. Mr. Justice Cardozo further pointed out

that the Commission had not found "that the existing relation is intrinsically sound and fair. On the contrary, it expressly concedes that the rate situation . . . may be in need of correction." 294 U.S. at 509. He then held that the appropriate action for the Commission was not to set aside the railroad's adjustment in rates but to institute "a comprehensive inquiry into the rates of all the lines within the area of controversy, . . . fix the fair relation between one line and another, and . . . build the rate structure accordingly." 294 U.S. at 509.

The principles applied in the *Chicago* Case are obviously just as apposite in cases of rate increases as they are in cases of rate reductions. Except that this case is one of rate increases, it is on all fours with that case. Here as there the Commission found rates under investigation unreasonable solely because of their relation to other rates not under investigation. Here no more than there did the Commission find that the rate relation its order compels the carriers to establish "is intrinsically sound and fair." Here as there, if the Commission is of the view that the "rate situation as [between points within Middle Atlantic Territory and points beyond] be in need of correction", the appropriate action is "a comprehensive inquiry into [all of] the rates of all the lines within the area of controversy," in which it can "fix the fair relation . . . and build the structure of the rates accordingly."[8] Here no more than there can the Commission order the cancellation of rates that are just and reasonable under the criteria of the rule of rate making.

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[8] This is precisely what Appellants asked the Commission to do in their Petition for Reconsideration of its order in this case.

The foregoing makes plain that the Commission has no power to compel either an increase or a decrease in rates that are within the zone of reasonableness except to remove discrimination, preference or prejudice, and then only under the "standards which control [the] exercise" of the power. The basic standard is of course a finding supported by substantial evidence that discrimination, preference or prejudice exist. No such finding was made in this case.

**The Long and Short Haul Clause is Inapplicable**

The District Court sought to bolster its holding with the following statement:

> "We agree with the examiner's reasoning concurred in by the Commission 'that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points.' Id. [319 I.C.C.] at 177. To the extent that such maladjustments occur, the increased rates are unjust and unreasonable." (App. A, p. 11a).

This statement amounts to a holding that rates of common carriers by motor higher for shorter distances than for longer distances are unlawful *per se*. This holding is plainly wrong. Section 4 of the Act, 49 U.S.C. § 4, makes it unlawful for rail or water carriers to charge more for a shorter than for a longer haul over the same route of movement unless they first obtain specific permission from the Commission to do so. Section 4 has nothing to do with the reasonableness of such higher rates. Hence a violation of it will not ground a suit for reparations. *Patterson v. Louisville & N. R., supra.* The purpose of Section 4 was to single out and prohibit one particular form of discrimination because of its prevalence among railroads at the time they were brought under federal

regulation. *McClelan* v. *Southern Ry.*, 6 I.C.C. 588 (1896). The effect of Section 4 is to transfer, in this limited respect, the initial rate making authority from the carriers to the Commission. *Intermountain Rate Cases*, 234 U.S. 476 (1914).

Section 4 was not embraced in the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, either directly or by reference to Part I. Hence, it is not applicable to motor carriers.[4] They, not the Commission, have initial rate making authority in all respects other than in fixing rates conditioned on limitations of their liability for loss and damage. The Commission's function is limited to reviewing the rates they make. In other words, motor carriers are free to discharge as they see fit their duty under Section 216(b) of the Act to establish rates, subject only to the authority of the Commission under Sections 216(e) and 216(g) to review those they have established and determine their lawfulness *vel non* under the criteria in Sections 216(d) and 216(i). Under those criteria rates, if just and reasonable in themselves, can be found unlawful only if they are found to result in unjust discrimination or undue preference or prejudice. As we have seen, the Commission and the District Court found Appellants' rates just and reasonable in themselves and held that there was no question of discrimination, preference or prejudice in this case. It follows that the fact that the rate relationships to which

[4] Since joint rail-motor rates are established pursuant to the authority of and governed by the criteria in Section 216(c) of Part II, 49 U.S.C. § 316(c), there is serious question whether Section 4 applies to such rates. See the Examiner's Report of April 1, 1964 in *Application of Section 4 Requirements To Joint Motor-Rail Rates Established Under Section 216(c)*, Docket No. 34234, holding that Section 4 does not apply. That case is now pending before the Commission on exceptions to that Report.

the Commission's order was addressed were relationships between rates for shorter hauls and rates for longer hauls over the same routes of movement does not make the principles of the *State of New York* and *Chicago* Cases any less controlling here.

In sum, Appellants are free, indeed duty bound as common carriers, to perform such transportation as their certificates of public convenience and necessity authorize at whatever lawful rates they choose. Neither the Commission nor the District Court can condition their exercise of this right and their performance of this duty on their reducing lawful rates in observance of Section 4, the provisions of which the Congress did not see fit to make applicable to them.

## CONCLUSION

We have shown that the opinion of the District Court mis-apprehended and mis-applied the principles of law and the statutory criteria that govern the exercise by the Interstate Commerce Commission of its authority to determine whether Appellants' rates in issue are just and reasonable, and that its judgment affirming the Commission's order requiring Appellants to cancel those rates is necessarily based on that erroneous opinion. We submit that it follows that this Court's duty on this appeal is to reverse that judgment.

Respectfully,

BRYCE REA, JR.
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Washington 4, D. C.

LOUIS LISMAN
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*Counsel for Appellants*

May 29, 1964

## APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil No. 3883

ACCELERATED TRANSPORT-PONY EXPRESS, INC., ET AL.

-VS-

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; LYNCHBURG TRAFFIC BUREAU, *Intervenor*

Before Waterman, Circuit Judge, and Gibson and Blumenfeld, District Judges.

Louis Lisman, Esq., Lisman & Lisman,
131 College Street, Burlington,
Vermont, for the Plaintiffs

Bryce Rea, Jr., Esq. Rea, Cross & Knebel,
917 Munsey Building,
Washington 4, D.C., for the Plaintiffs

Joseph F. Radigan, United States Attorney,
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Rutland Vermont, for the Defendant
United States

Robert W. Ginnane, Esq.,
Interstate Commerce Commission,
Washington 25, D.C., for the Defendant ICC

Clayton H. Kinney, Esq.,
Rutland, Vermont, for the Intervenor

Wilbert G. Burnett, Esq.,
1017 Church Street,
Lynchburg, Virginia, for the Intervenor

BLUMENFELD, *District Judge.*

The Middle Atlantic Conference[1] filed a schedule of

[1] The Middle Atlantic Conference is an organization of motor carriers, established pursuant to § 5a of the Interstate Commerce Act, 62 Stat. 472 (1948), 49 U.S.C. § 5b (1958), which establishes and publishes rates for the account of its members.

proposed rates with the Commission which would establish a general increase in motor carrier class and commodity rates between points in Middle Atlantic Territory[2] and between Middle Atlantic and New Engiand Territories.[3] On January 13, 1961, the Commission instituted an investigation into the lawfulness of the proposed increases. Pending a final decision by the Commission, the increases became effective on January 16, 1961. Protests to the increased rates were filed by numerous parties, including those who have intervened as defendants in this court proceeding.

This case orginated and was conducted as a general revenue proceeding in which the carriers' needs, as a group,[4] for a general increase in rates[5] were considered by the Commission, as distinguished from a need of individual carriers for increased rates for specific traffic or different commodities. To effect the increase in revenue, the plaintiffs proposed generally to superimpose flat arbitrary amounts on already existent rates, regardless of classification ratings. It is plain that flat arbitraries would distort traditional percentage relationships between classifications and would result in greater increases percentage-wise and per mile on the shorter hauls and on the lower-rated traffic. The effect of this would be to increase the likelihood of higher rates for short than for long hauls through

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[2] Middle Atlantic Territory includes the states of New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and the District of Columbia, and parts of Kentucky and Tennessee.

[3] New England Territory includes the states of Maine, Vermont, New Hampshire, Massachusetts, Rhode Island and Connecticut.

[4] The group was comprised of approximately 3000 motor carriers of whom some 1300 were members of the Conference.

[5] Except in certain short hauls in the New York Metropolitan area, and some class and commodity rates on interstate routes, all specifically excluded from the proposal submitted by the plaintiffs.

border points and beyond to territories where the rates are lower.

After an exhaustive hearing before one of the Commission's examiners, and following the submission of briefs by the parties, the examiner issued his recommended report and order. The examiner concluded that the proposed increases generally were just and reasonable.* But he also concluded that, where the effect of the proposed increases resulted in rates which were higher to intermediate border points than to points beyond over the same routes, they were not shown to be just and reasonable. Exceptions to the examiner's report were filed by both the respondents (plaintiffs) and the protestants, and on March 20, 1963 the report of Division 2 of the Commission was issued. This stated:

> "With respect to resulting higher rates to border points than to points beyond over the same routes, obviously, in accord with prior decisions of the Commission, such higher rates would be unlawful, and we concur in the conclusion of the examiner in this respect that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points. To the extent that such maladjustments occur, the increased rates are unjust and unreasonable.
>
> "We find that the increased rates and charges are just and reasonable, except that where the resulting rates to intermediate points are higher than the rates to more distant points over the same routes, the former are not shown to be just and reasonable. The schedules will be ordered canceled to the extent found

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*The Commission enlarged the weight categories to which the addition of arbitraries might be found just and reasonable to include shipments of less than 6000 lbs., a finding the examiner was unwilling to make.

[not shown]* unlawful, without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points in the area here considered. The proceeding will be discontinued." (319 I.C.C. at 177)

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* Bracketed portion deleted by Report and Order February 4, 1964.

The petition of the respondents for reconsideration of the report and order of the Commission insofar as it directed them to reduce their rates to border points, filed on May 15, 1963, was denied by Division 2, Acting as an Appellate Division, "for the reason that sufficient grounds have not been presented to warrant granting the action sought."

The respondents thereafter filed this complaint against the United States and Interstate Commerce Commission to set aside and annul the Commission's order, 28 U.S.C. §§ 1336, 1398 (1958), and obtained a temporary restraining order. 28 U.S.C. § 2284(3) (Supp. III, 1959-61). Subsequently, this court of three-judges was convoked as required by 28 U.S.C. § 2325 (1958). The protestants before the Commission were granted leave to intervene in behalf of the defendants. The restraining order was continued in effect only until a hearing was held on plaintiffs' action for final relief. We have concluded that the complaint should be dismissed.

The target of the plaintiffs' argument is that portion of the Commission's decision which holds that such higher rates to intermediate border points are not shown to be just and reasonable. The plaintiffs do not challenge the finding that blanket application of the arbitraries to increase all of the rates would in some cases result in a higher charge for hauling goods to a "border point"

located within the Middle Atlantic Territory than for hauling the same goods, over the same route, through the border point, to a point located in a different territory.

The attack proceeds on two grounds: First, that the Commission's reliance upon a presumption that higher rates for shorter distances than for longer distances are unreasonable was unjustified because the "presumption" merely shifted the burden of going forward to the plaintiffs. On that basis they argue that, since they did come forward with evidence, the effect of the presumption was dissipated. Secondly, they contend that "assuming . . . that the fact that some of the plaintiffs' rates for shorter distances are higher than other rates for longer distances has probative value as evidence that they are unreasonable, the evidence as a whole does not support the Commission's finding that they are unreasonable." (Reply Brief for Plaintiffs, p. 9)

These contentions must be considered in light of statutory provisions which govern the rate-making functions of the Commission. Whenever a motor carrier files a tariff containing a new rate, sub-section 216(d) of the Motor Carrier Act,[7] as amended, 49 U.S.C. § 316(d)(1958), requires that it shall be "just and reasonable," and declares that every "unjust and unreasonable charge" is unlawful:

> "(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause

[7] 49 Stat. 543 (1935).

> any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this sub-section shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

And whenever, as in this case, a carrier seeks a change in rates, sub-section 216(g) of the Act, as amended, 49 U.S.C. § 316(g)(1958), places the burden of proof on the carrier:

> "At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable."

These laws are very plain and their application to this case is not difficult. They obviate the need for a critical analysis of the technical refinement of the vocabularly of presumptions urged upon us by the plaintiffs. It has long been established that rates higher for short hauls than for longer hauls, via the same carrier, over the same route, is so significant an element affecting reasonableness as to make such rates unreasonable on their face. In the leading case of *Patterson* v. *Louisville & N. R.R.*, 269 U.S. 1, 46 S. Ct. 8, 70 L. Ed. 131 (1926), Mr. Justice Bradeis stated: "Apart from statutory enactment it is prima facie unreasonable to charge more for a shorter than for a longer

haul." 269 U.S. at 11.[8] Followed in *Atlas Portland Cement Co.* v. *Northampton & B. R.R.*, 120 I.C.C. 583, 585 (1927); *Sun Oil Co.* v. *Central R.R. Co.*, 301 I.C.C. 558, 560 (1957). The same principle has been applied by the Commission since the earliest days of its administration of the Motor Carrier Act. In *Fifth Class Rates Between Boston and Providence*, 2 M.C.C. 530 (1937), it stated:

> "In the absence of a sound reason therefor, the maintenance of class rates to intermediate points higher than to more distant points on the same route by a motor carrier is prima facie unreasonable." (2 M.C.C. at 546)

There is no need to call the entire roll of the many subsequent decisions which have adhered to the principle. A few examples are *New England Motor Carrier Rates*, 8 M.C.C. 287, 322-23 (1938); *Electric Storage Batteries from Kansas to Missouri*, 46 M.C.C. 729, 732 (1947); *Ford Motor Co.* v. *Standard Transp. Co.*, 62 M.C.C. 311, 315 (1953).

The plaintiffs did not urge before us, nor does the extensive record before the Commission disclose, that uncontroverted evidence of segregated costs for the particular traffic subjected to the rates which the Commission has found were not shown to be reasonable was presented to the Commission. Cf. *Middle West Exceptions Ratings, Cancellation*, 48 M.C.C. 53, 58 (1948). That the plaintiffs were fully aware of the presence of this issue is clear. By motion filed March 5, 1962, the carriers sought to sever the issue of border point rate disparities and to postpone further proceedings on that issue. The Commission, by order of June 7, 1962, denied the motion stating that

[8] In the case of rail carriers, Section 4 of the Interstate Commerce Act, 24 Stat. 380 (1887), as amended, 49 U.S.C. § 4 (Supp. IV, 1959-62), specifically prohibits a greater charge for a shorter haul without the Commission's prior approval.

sufficient grounds therefor had not been presented. Denial of that motion is not made a ground of the complaint before us. The plaintiffs had first-hand knowledge that what happened here has often happened before in general revenue proceedings of this nature. In 1949 these plaintiffs were admonished to remove border maladjustments at Lynchburg and other border points. *Increases, Middle Atlantic and New England*, 49 M.C.C. 357, 366. Again in 1956, in *Class Rates Between Middle Atlantic and New England Territories*, 67 M.C.C. 741, the Commission said:

> "Higher class rates for lesser distances over the same routes as revealed on this record are clearly unjust and unreasonable. In publishing rates in conformity with our findings in these proceedings, we shall expect the respondents to eliminate all rate discriminations similar to that above described." (67 M.C.C. at 761)

Nor do the plaintiffs, who are willing enough to accept the approval of the increased rates generally, claim that without the approval of these proposed increases to the rates to border points that those rates are unremunerative. There is no inherent inconsistency between the Commission's finding that higher rates to border points were not shown to be reasonable and its finding that increased rates of all the carriers considered as a group in other respects were reasonable. The burden of proof was on the plaintiffs to show that the proposed increases in rates which would result in a higher rate for a shorter than a longer haul were just and reasonable. They did not satisfy that burden.

The determination of the justness and reasonableness of rates is peculiarly a matter for the judgment and discretion of the Commission. *Board of Trade* v. *United States*, 314 U.S. 534, 545-46, 62 S. Ct. 366, 86 L. Ed. 432 (1942); *Mississippi Valley Barge Line Co.* v. *United States*, 292

U.S. 282, 286-87, 54 S. Ct. 692, 78 L. Ed. 1260 (1934); *Western Paper Makers Chem. Co.* v. *United States*, 271 U.S. 268, 271, 46 S. Ct. 500, 70 L. Ed. 941 (1926).

The Supreme Court pointed out in the *Mississippi Valley Barge Line* case:

> "The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. *Florida* v. *United States, ante*, p. 1. It is not the province of a court to absorb this function to itself. *I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 100; *Western Paper Makers Chemical Co.* v. *United States*, 271 U.S. 268, 271; *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 663. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." (292 U.S. at 286-87)

In *Western Paper Makers Chem. Co.*, the Supreme Court said:

> "The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. *Skinner & Eddy Corporation* v. *United States*, 249 U.S. 557, 562; *New England Divisions Case*, 261 U.S. 184, 204." (271 U.S. at 271)

These decisions in rate cases comport with the general principle that orders of the Commission should not be set aside, modified, or disturbed by a court on review if they lie within the scope of the Commission's statutory authority and are based upon adequate findings, which are in turn supported by substantial evidence, even though the court might reach a different conclusion on the facts

presented. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535-36, 66 S. Ct. 687, 90 L. Ed. 821 (1946); *Rochester Tel. Co.* v. *United States*, 307 U.S. 125, 138-40, 59 S. Ct. 754, 83 L. Ed. 1147 (1939). The Commission's judgment is to be exercised in the light of the facts of each individual case, and the courts have no concern with the consistency or inconsistency of decisions it has rendered. *Virginian Ry.* v. *United States*, 272 U.S. 658, 663, 47 S. Ct. 222, 71 L. Ed. 463 (1926); *Western Paper Makers Chem. Co.* v. *United States, supra.* Furthermore, there is a presumption that the Commission has properly performed its official duties, and this presumption supports its acts in the absence of clear evidence to the contrary. *I.C.C.* v. *City of Jersey*, 322 U.S. 503, 512, 64 S. Ct. 1129, 88 L. Ed. 1420 (1944); *Baltimore & O. R.R.* v. *United States*, 298 U.S. 349, 358-59, 56 S. Ct. 797, 80 L. Ed. 1209 (1936).

The plaintiffs' attempt to inject a question of undue preference and prejudice is rejected as irrelevant to the issue or proof in this case. That question is not in this case. Under sub-section 216(d) of the Act, motor carrier rates are required to meet two separate and distinct criteria; First, they must be "just and reasonable;" and second, they must not result in "undue or unreasonable preference or prejudice." The report of the Commission is unmistakably clear that the basis for condemning the higher rates to border points was that the rates to that extent were not shown to be just and reasonable. The Commission did not purport to find that the rates resulted in undue preference and prejudice. Such a finding was not necessary for the decision reached or to the validity of the order.

The plaintiffs do not contend that the principle that a higher charge for a shorter haul than a longer haul is prima facie unreasonable was inapplicable on the ground that the longer haul terminated outside the territory. But

in an attack upon the order that the scheduled increases which create rate disparities at border points be canceled to the extent that the resultant rates are higher at intermediate than at more distant points, they do contend that since the disparities at the border points are the result of lower rates beyond the border the order is invalid because the plaintiffs have no control over rates beyond the border. This asserted defense was specifically rejected by the Commission:

> "The respondents claim that they are powerless to correct such situations, and suggest that the rates to and from the border points be required as minimum rates to and from the more distant points. Interterritorial rates are not here in issue." (319 I.C.C. at 175)

We agree with the examiner's reasoning concurred in by the Commission "that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points." *Id.* at 177. To the extent that such maladjustments occur, the increased rates are unjust and unreasonable. We perceive no meritorious legal basis for an attack upon the Commission's order that the schedules be "canceled to the extent found unlawful without prejudice to their amendment as to provide for the application of lower rates to more distant points as maxima at intermediate border points in the area here considered." 319 I.C.C. at 177 (as corrected by Report and Order, February 4, 1964). See *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, 310 I.C.C. 503, 505-06 (1960).

There is ample warrant in the evidence and the statute for the findings in the Commission's report. The report on its face clearly expresses and explains the conclusions reached. And, in our view, the Commission's conclusions were not inadequate, immaterial or arbitrary. See *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 83 S. Ct.

217, 9 L. Ed. 2d 177 (1962). Accordingly, we sustain the order of the Interstate Commerce Commission and order that the complaint be dismissed.

Dated March 2, 1964.

M. JOSEPH BLUMENFELD
United States District Judge

Accelerated Transport-Pony Express, Inc. v. United States and ICC

Endorsed: Feb. 27, 1964
I concur
SRW

Further endorsed: Feb. 29 '64
Brattleboro Vt.
I concur—
EWG.

Further endorsed: Filed March 3, 1964
ARNOLD A. MURRAY, Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 3883

ACCELERATED TRANSPORT—PONY EXPRESS, INC., ET AL.,
*Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

**Final Judgment**

This cause having been submitted upon the record made before this Court, including the record of proceedings before the Interstate Commerce Commission in its Docket No. 33652, and the briefs and arguments of counsel; and the Court having entered its opinion on March 3, 1964, to the effect that the order of the Commission is valid and lawful in all respects, and should be affirmed, it is hereby

ORDERED, ADJUDGED AND DECREED that the order of the Commission be and it is hereby affirmed, and that the plaintiffs' application for permanent injunction be and it is hereby denied.

STERRY R. WATERMAN
Sterry R. Waterman
*United States Circuit Judge*

ERNEST W. GIBSON
Ernest W. Gibson
*United States District Judge*

M. JOSEPH BLUMENFELD
M. Joseph Blumenfeld
*United States District Judge*

Dated at Burlington, Vermont
this 3rd day of March, 1964.

Endorsed: Filed March 30, 1964

ARNOLD A. MURRAY, *Clerk.*

## APPENDIX B

INTERSTATE COMMERCE COMMISSION

Service Date April 3, 1963

No. 33652

GENERAL INCREASE—MIDDLE ATLANTIC AND NEW ENGLAND TERRITORIES

Decided March 20, 1963

Increased class and commodity rates of motor common carriers within middle Atlantic territory, and between that territory and New England territory, found just and reasonable, except that where such rates are higher to intermediate border points than the rates to more distant points over the same routes, the former found to be unlawful. Schedules ordered canceled to the extent found unlawful, and proceeding discontinued.

*Bryce Rea, Jr.*, for certain respondents and intervener.

*Arthur A. Arsham, John S. Burchmore, Robert N. Burchmore, W. G. Burnette, Edgar W. Caterson, Charles M. Donley, John B. Hedges, George H. Kinney, Morris Levinson, Dickson R. Loos, J. H. Macomber, Jr., John F. C. Martin, Charles B. Myers, William R. Pierce, Warren A. Rawson,* and *Stanley H. Tippett* for protestants.

**Report of the Commission**
**Division 2, Commissioners Freas, Webb, and Herring**

WEBB, *Commissioner:*

Late exceptions to the examiner's recommendations, received as a brief of exceptions, were filed by certain respondents and the intervener supporting the respondents, and the protestants replied. Also, exceptions were filed by certain protestants. Our conclusions differ in part from those of the examiner. Exceptions and requested findings

not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

This is an investigation, instituted by order dated January 13, 1961, into the lawfulness of general increases in motor common-carrier class and commodity rates,[1] and in rates and charges for accessorial services, published to became effective on January 16, 1961, and later, between points in middle Atlantic territory, with certain exceptions hereinafter noted, and between middle Atlantic and New England territories.[2] With minor exceptions,[3] the increased rates and charges are contained in agency tariffs published by the Middle Atlantic Conference, hereinafter called the Conference, for the numerous motor common-carrier respondents. The rates were protested by several parties,[4] but they were permitted to become effective as published, subject to this investigation. Concurrently with the establishment of the increases, the respondents canceled a

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[1] Rates, charges, increases, costs, and differences therein are stated per 100 pounds, unless otherwise indicated.

[2] The boundaries of the two territories are described in footnotes 4 and 5, *Class Rates, Middle Atlantic & New England Territories*, 67 M.C.C. 741, 743.

[3] Certain tariffs of Continental Transportation Lines, Inc., and of Reading Transportation Company are included also in the investigation; they both agree to be bound by the decision respecting the agency tariffs.

[4] The General Services Administration, representing all executive agencies of the Federal Government except the Department of Defense; the National Industrial Traffic League; Eastern Industrial Traffic League, Inc.; New England Industrial Traffic League; Lynchburg, Va., Traffic Bureau; Official Territory Paper Traffic Conference; Associated Industries of New York State, Inc.; National Paint, Varnish and Lacquer Association, Inc.; Greater Philadelphia Shipper-Receiver Interests; Manufacturers Association of Connecticut, Inc.; Industrial Fasteners Institute; United States Screw Service Bureaus; and National Association of Chain Manufacturers.

temporary surcharge of $1 per shipment, subject to a maximum of 10 percent, which had been in effect since June 27, 1960. For convenience, the increases which became effective on January 13, 1961 will be referred to as the proposed increases, and rates including those increases as the proposed rates.

The proposed increases generally are flat amounts. To the rates on less-than-truckload quantities of under 2,000 pounds, 2,000 to 5,999 pounds, and 6,000 pounds and over, the respective proposed increases for 100 miles and over are 30 cents, 10 cents, and 3 cents. The flat increases on truckload shipments range from 1 to 3 cents. Rates and other charges stated in units other than per 100 pounds are increased 10 percent, except that no increase is proposed in minimum charges per shipment, the latter charges having been separately increased effective December 10, 1960. The proposed increases are detailed in appendix A to this report, and present and proposed class rates for representative distances are shown, along with other data, in appendix B. The increases do not apply within certain portions[5] of middle Atlantic territory, and it appears also that they are not applicable, or are applicable only in part, to the rates on some commodities, of which candy and iron and steel articles in truckloads, and brass and copper articles are mentioned of record.

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[5] Increases are not proposed within the so-called New York short-haul area (New York, N. Y., Nassau, Rockland, Suffolk, and West Chester Counties, N. Y., and a portion of New Jersey), nor between the New York City metropolitan area, including northern New Jersey points, on the one hand, and, on the other, points in a large portion of New York (Herkimer and west). Also, the increases do not apply on class rates over interstate routes between points in New York; on class rates between the Baltimore, Md., and Washington, D. C., areas; on class rates between Cumberland, Md., and some 25 rate groups in western Maryland, southwestern Pennsylvania, northwestern Virginia, and northern West Virginia; nor on commodity rates between the Norfolk, Va., area, on the one hand, and, on the other, Washington, Baltimore, Wilmington, Del., Philadelphia, Pa., and New York, and points in the vicinity of those cities.

A history of the respondents' rates is set forth in *Class Rates, Middle Atlantic & New England Territories*, 67 M.C.C. 741, decided August 2, 1956, hereinafter referred to as No. MC-C-1600, and except for the maintenance from June 27, 1960 to January 16, 1961, of the temporary surcharge and the increase in minimum charges per shipment effective December 10, 1960, stated above, their rates and charges have not been subjected to a general increase since December 1958. In No. MC-C-1600, the respondents' proposal to establish flat arbitraries of 45 cents on shipments weighing less than 2,000 pounds, and 20 cents on shipments weighing 2,000 to 5,999 pounds, was found not shown to be just and reasonable, but their counter proposal to establish arbitraries declining with the classification ratings of commodities was approved. However, the arbitraries, and consequently the resulting rates, did not reflect the traditional percentage relationship of the lower classes to class 100, and this situation still exists.

The instant proposal to superimpose flat amounts upon the present rates, regardless of classification ratings, results in somewhat greater distortions of the percentage relationships. For example, the present class-70 rates on shipments under 2,000 pounds for representative distances of 100 and 500 miles reflect 74 and 72.2 percent, respectively, of the class-100 rates, while the corresponding proposed class-70 rates are 77.1 and 74.3 percent, respectively, of class 100. Concomitant effects are greater increases percentagewise and per mile on the shorter hauls, and on the lower-rated traffic.

The respondents recognize that the proposal changes the traditional percentage relationship between the classes. However, they urge that increased revenues are needed particularly because of increases in labor and terminal costs, the latter being higher proportionately on the smaller shipments. They claim that the use of percentage increases would further burden the higher-rated traffic, when it is the lower-rated less-than-truckload traffic on which the

rates are not compensatory. On the other hand, the protestants assert that the proposed increases cast a disproportionate burden on the low-rated traffic; that increasing rates by flat amounts is contrary to sound classification principles; and that the use of operating ratios as the basis for determining the revenue needs of the respondents is improper.

The Conference compiled data from responses to two questionnaires circulated to its 1,300 members. Sixty-nine carriers responded to one questionnaire, 63 to the other, and 40 of the carriers responded to both. The carriers responding to the questionnaires appear to be typical of all the carriers operating in the territories concerned. They include some of the largest carriers active within the area and their combined operating revenue for the year 1960, was $365,190,777 or 42 percent of the total revenue of $871,040,700 reported by the 389 Class I and Class II motor carriers of property in Middle Atlantic and New England territories. The group of 69 carriers reporting furnished their actual operating revenues and expenses for each of the four quarters of 1960 and for the first quarter of 1961, and the estimated revenues based on the proposed rates and estimated expenses for the remaining three quarters of 1961. The average of the operating ratios for the four quarters of 1960 and the first quarter of 1961 were 99.2, 97.5, 96, 99.7, and 100 percent, respectively. To show that those averages are representative, comparison is made with the average of the ratios of the 389 class I and class II motor carriers of property in middle Atlantic and New England territories for the same five quarters, which are 99.5, 97.5, 96.5, 101.0, and 101.4 percent, respectively. Although the drop in operating ratios for the third quarter of 1960 occurred in the first quarter in which the temporary surcharge was effective, it was also in effect during the last quarter of 1960, and the increases under consideration were effective during most of the first quarter of 1961, when substantial increases in the operating

ratios were experienced. There is evidence which indicates that seasonal weather conditions were influential. The following table shows the number of the 69 carriers with operating ratios in the specified groups:

| | 1960 | | 1961 | |
|---|---|---|---|---|
| Ratio | Third quarter | Fourth quarter | First quarter | Second quarter (est.) |
| Under 90 | 10 | 1 | 2 | 13 |
| 90-92.9 | 8 | 1 | 4 | 15 |
| 93-94.9 | 6 | 4 | 7 | 8 |
| 95-97.9 | 30 | 19 | 11 | 20 |
| 98-100 | 8 | 14 | 9 | 8 |
| Over 100 | 7 | 30 | 36 | 5 |

The operating ratios estimated for the last three quarters of 1961 were 98.6, 98.7, and 99.2 percent, respectively. The annual and quarterly reports of the respondents were incorporated in the record by reference, and on brief, the National Industrial Traffic League indicates that a study of the actual expenses and revenues of the 69 carriers for the second quarter of 1961 shows the average operating ratio to be 95.35 percent, instead of 98.6 percent, as a consequence of revenues $1.3 million greater and expenses $1.8 million lower than estimated.

The questionnaire to which 63 carriers responded requested certain traffic and revenue data for any two days in September and October 1960. Of the responding carriers, 24 recapitulated a single day's operation, and a few carriers used days from months other than those named. Respondents' traffic study is in part a substitute for the regular formula study form, I.C.C. Form 2 traffic analysis, which covers a 4-day study period and provides for a breakdown of shipments by weight brackets. The shipments reported were re-rated to reflect the proposed rates, and the increased revenues were compared with revenues either including or excluding the surcharge. Average weights of shipments in each of the less-than-truckload weight categories also were derived. Of the total number of ship-

ments transported by the 63 carriers during the days reported, 41,635 shipments weighing approximately 98.5 million pounds and representing about 30 percent of the total number handled, were subject to the increases. A breakdown of the less-than-truckload shipments by weight brackets to obtain the average weights resulted in the following: 0-1,999 pounds, average 520; 2,000-5,999 pounds, average 2,875; and 6,000 pounds and over, average 8,097. Truckload shipments averaged approximately 30,567 pounds.

The respondents estimate that the total revenues, including minimum charges, would be 4 percent higher than revenues, including the surcharges, and 7.9 percent higher excluding the surcharges. Applying the increase of 4 percent to the revenues of the 389 class I and class II motor carriers in the middle Atlantic and New England regions during the last half of 1960, when the surcharges were in effect, and the average increase of 7.9 percent to the first half of that year when, with the exception of a few days, there were no surcharges, the respondents estimate that the 1960 operating revenues of the 389 carriers of $871 million would have been greater by $51.5 million, and that the ratio of expenses to revenues would have been 93.2 percent.

The estimates are overstated because the average percentage increases are applied to the carriers' total revnues, including many interterritorial shipments which would not be subject to the increased rates. Adjusting the percentages to take account thereof, the resulting 2.2 and 4.3 percent would increase the total revenues to $899 million, or $28 million more than the 1960 total operating revenue, and would produce an operating ratio of 95.6 percent instead of 93.2 percent.

To support their claim that the increases are necessary and that greater increases are justified on the smaller shipments because terminal expenses have risen more than line-haul expenses, the respondents developed cost evidence from the working papers underlying public statement

No. 7-56, "Cost of Transporting Freight by Class I Motor Carriers of General Commodities—Middle Atlantic Region —1955—Other than New York-Philadelphia Carriers," prepared by our Cost Finding Section. By application of Highway Form B,[6] the out-of-pocket costs were adjusted to reflect the year 1959 and the expense level for the first half of 1960 was developed from the quarterly reports for that period. The comparison of 1955 unit costs with those for the first half of 1960 shows that the line-haul cost per vehicle-mile increased during this period by 2.381 cents, or .00466 of a cent per hundredweight-mile, which represent increases of 7.184 and 3.384 percent, respectively. During the same period, the pickup and delivery cost per 100 pounds handled increased 3.047 cents, platform cost per 100 pounds increased 7.126 cents, and billing and collecting cost per shipment increased 13.717 cents, or percentage increases of 23.424, 34.067, and 33.398, respectively.

The total of the out-of-pocket terminal-cost elements specified has not been uniform on shipments of various weights, as demonstrated by the following table showing increases in cents per 100 pounds, 1960 over 1955:

| *Shipment category* | *Increase* |
|---|---|
| | (cents) |
| Less-than-truckload: | |
| Under 2,000 pounds (including minimum-charge shipments) | 36.6 |
| 2,000-5,999 pounds | 16.5 |
| 6,000-11,999 pounds | 9.9 |
| Truckload: | |
| 24,000 pounds | 5.3 |
| 30,000 pounds | 4.2 |

[6] Highway Form A, Statement No. 4-55, the so-called long formula, is the basis of costs in statement No. 7-56; Highway Form B, statement No. 3-59, is a simplified form of the Form A formula.

The respondents construct mileage cost scales for the various classes and weight categories, using 1960 costs and the average weights in the less-than-truckload categories, to show both single-line and interline out-of-pocket and total costs for 25-mile distance blocks up to 500 miles, for comparison with the present and proposed rates. The out-of-pocket costs represent 90 percent of operating expenses, rents, and taxes (excluding income tax), and the total expense level represents total carrier operating expenses, rents, and taxes. In addition, the latter level is increased by about 7 percent to show revenue needed to provide an operating ratio of 93 percent. The results are shown in appendix C. With some exceptions,[7] the present class rates exceed the single-line out-of-pocket level of costs shown by the respondents. Although the relationship of single-line or interline traffic to the total traffic is not established, according to statement No. 7-56, single-line traffic represented 74 percent of the total traffic handled. Neither is the volume of traffic moving at the various class ratings shown, but in No. MC-C-1600, class 70 was considered as the average rating of less-than-truckload shipments, and in this proceeding the General Services Administration's evidence of shipments within middle Atlantic territory and between that territory and New England indicates that of 180 commodities representative of those shipped, 64.4 percent were rated class 70 or higher.

As indicated, the respondents' cost data constitute an updating of 1955 costs developed in statement No. 7-56. During cross-examination, the respondents' cost witness

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[7] In the weight bracket under 2,000 pounds, the out-of-pocket costs exceed the present class-70 rates for 25 and 50 miles, and the class-50 rates for all distances; in the 2,000-5,999-pound category, the present class-50 rates are below single-line out-of-pocket costs for the first 100 miles, and in the 6,000-pound and over category, for the first 25 miles; on 24,000-pound truckloads, the present class 27.5 rates are under single-line out-of-pocket costs for 300 miles and over; and on 30,000-pound truckloads, the class 27.5 rates is less than such cost at 500 miles.

referred to a pending new statement for 1960, stating that he expected no difference of substance between its results and the evidence introduced. Subsequently, that study was issued by our Cost Finding Section as public statement No. 1-62. The latter statement, however, is not, as characterized by the Eastern Industrial Traffic League, an "updated reissue of 7-56." As previously indicated, statement No. 7-56 did not include the short-haul New York-Philadelphia carriers, such carriers being the subject of a separate analysis. In statement No. 1-62, the separation of the two groups was not observed. Thus, the latter is not comparable with the statement forming the basis of the respondents' cost evidence.

The National Industrial Traffic League criticizes the respondents' cost evidence as reflecting the relationship of productivity and operations as it existed in 1955; for example, it assumes that the distribution of weight brackets was the same in 1960 as in 1955, and that the percentage of platform handling in each weight bracket was the same. It is critical also of the weight grouping, referring to the relatively higher cost of handling a 150-pound shipment than a 1,500-pound shipment, and suggesting that a more detailed study might show that present rates on less-than-truckload traffic as a whole are compensatory. Insofar as performance factors relate to current traffic distribution or method of operation, the partial effect of the load factor which is based on the change in the system average load for the various periods studied, is considered in the application of the formulas for the adjustment of the costs to a current level. For adjustment of costs to current levels full scale traffic studies are not conducted to obtain all new performance factors. Past studies have shown that factor changes were not sufficient to change the cost to any degree. The exception to the rule would be radical changes in carriers operations or excessive lapse of time. The record does not indicate any revolutionary changes in carrier operations nor is the matter of time considered unreasonable.

The General Services Administration made a study comparing out-of-pocket costs and revenue need with the present and proposed rates for single-line movements of shipments in various weight groups for 56, 186, 255, and 399 miles. The costs from statement No. 7-56 were increased 16.1 percent to the 1960 level, reflecting the difference between the average expense per ton for the year 1955 and the 12-month period ending on September 30, 1960, and 15.7 percent more to reflect revenue necessary to produce an operating ratio of 96 percent, the latter being the highest average ratio which the class I carriers in the middle Atlantic region have experienced since 1950. On the basis of such comparisons, this protestant concludes that there is no need for an increase, except on some shipments between 150 and 999 pounds, and certain class-50 rates in other weight groups. The method followed in so estimating the costs, however, lacks precision, and the results are not representative.

A number of instances are shown where the proposed rates are higher to border points within the affected area which are intermediate over the same routes to points outside the area to which lower rates apply. The respondents claim that they are powerless to correct such situations, and suggest that the rates to and from the border points be required as minimum rates to and from the more distant points. Interterritorial rates are not here in issue.

Reference is made to the examiner's report for a more detailed discussion of the individual protestants' evidence. As previously indicated, there is general agreement among the protestant that the proposed flat increases further undermine the relationship between the classes, and in their opinion place too large a burden on the smaller shipments. There is also opposition to the increases of 1 to 3 cents in the truckload rates on the ground that they are profitable without the increases. With respect to a determination of the need for increases, the protestants, principally the two traffic leagues, attack the use of composite

operating ratios as the primary criterion, and contend that there should be an examination of the transactions between regulated carriers and their subsidiaries or affiliates which provide equipment, supplies, and especially terminal facilities.

Very recently, the Commission had occasion to consider these same arguments. In Investigation and Suspension Docket No. M-14704, *General Increases—Eastern Central Territory*, — I.C.C. —, (decided June 14, 1962), in addition to flat increases of 32 cents on shipments from 300 to 999 pounds and 20 cents on shipments from 1,000 to 1,999 pounds, so-called "constant charges" were proposed as minimum charges on shipments under 300 pounds regardless of the classification rating of the article or commodity shipped. In finding that such rates and charges are not inherently unlawful, the protestants' arguments therein regarding the nature of the increases were discussed as follows:

> The Commission has no authority, of course, to exempt carriers from the statutory duty to provide and maintain just and reasonable classifications of property. We likewise have no authority to assume, contrary to fact, that the elements usually considered in establishing reasonable classifications have any material significance in the transportation of shipments weighing less than 300 pounds. The legal issue, therefore, turns upon the following question of fact: Is weight such a predominant characteristic of all small shipments that other transportation characteristics of the articles shipped are of no material consequence?
>
> We think it is clear beyond any reasonable doubt that the classification of a small shipment does not materially affect the carrier's cost of performing the service. High density, for example, deserves to be reflected in the rates on the larger less-than-truckload shipments but, as the respondents show, its impact is almost lost on shipments weighing less than 300 pounds. Actually, it is the steadily rising cost of labor which has enabled small shipments to be treated as a

> separate and reasonable classification within the meaning of the statute. Labor represents a high percentage of the cost of terminal service and terminal service, in turn, represents 80 percent of the total cost of handling small shipments. In these circumstances the respondents have concluded that it is no longer possible to give effect to classification ratings on small shipments and at the same time to avoid continued losses. Their analysis of the problem is similar to that made by the Commission ten years ago in its 66th Annual Report to the Congress (excerpts from which followed).

The arguments respecting consideration of transactions between respondent carriers and their affiliates in revenue proceedings, and the use of operating ratios to measure revenue need, also raised in the cited proceeding which was decided after the record was made in the present proceeding, were there recognized as follows:

> Although an oprating ratio of 93 percent has been found reasonable in the past, we do not regard such an operating ratio as an immutable standard. In view of the numerous changes which have taken place in the motor carrier industry, we believe this matter should be thoroughly explored in the light of a more complete record developed either in a further hearing in the instant proceeding or in some similar proceeding. At the same time, we believe that the parties, in cooperation with the Commission, should produce all the information required to show the precise effect of transactions between carriers and their subsidiaries or affiliates on carrier operating ratios. In *Surcharge on Small Shipments within Central States*, 63 M.C.C. 157, it was estimated that giving effect to such transactions would not reduce the combined operating ratio of the carriers involved by more than 0.5 percent.

As indicated in the cited report, in numerous motor-carrier general-increase cases we have found an operating ratio of 93 percent to be reasonable. The ultimate findings in the cited proceeding, in view of the nature of the constant charges, were made without prejudice to reopen-

ing the proceeding for further hearing "after a reasonable period of time has been afforded to test the results of the increased rates and charges." Here, except for the arguments on brief and exceptions, the record basis for refusing to accept composite operating ratios as a standard for measuring revenue need is no more persuasive than that in the foregoing proceeding.

While we have found in numerous motor-carrier general-increase cases that an operating ratio of 93 percent appears to be reasonable, we will expect in the future where operating ratios are used as a criterion for revenue need, that evidence of the expense items of representative carriers which form the basis for the operating ratios relied upon, will be given in more detail. The mere showing of present operating ratios of above 93 percent without a showing of the factors that make up such a ratio is not sufficient for our purposes. Among the points that we wish to stress is the necessity of giving us information concerning transactions between involved carriers and their affiliates or subsidiaries. As we pointed out in *General Increases—Eastern Central Territory, supra,* we will expect carrier cooperation in the future in this regard. Since the record in this proceeding was made prior to the statement made in that case, the respondents here shall not be held to such a standard. For the future, though, the carriers are admonished to supply us with all pertinent information and also to conform to the instructions which are a part of the annual report form in reporting details of arrangements between themselves and such affiliates or subsidiaries.

The respondents concede, that, in general, the truckload rates have exceeded costs, but it does not appear that the addition of the relatively small increases thereon, including the 3-cent increase on shipments of 6,000 pounds or more, result in rates which exceed reasonable maximum levels. As above indicated, terminal costs have increased disproportionately on smaller shipments, and in accord

with the finding in *General Increases—Eastern Central Territory, supra,* we conclude that the application of the flat increases is not inherently unlawful. Considering the respondents' cost estimates, which are acceptable as fair approximations, we find that the flat increases on shipments of less than 6,000 pounds do not result in rates which exceed reasonable maxima.

With respect to resulting higher rates to border points than to points beyond over the same routes, obviously, in accord with prior decisions of the Commission, such higher rates would be unlawful, and we concur in the conclusion of the examiner in this respect that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points. To the extent that such maladjustments occur, the increased rates are unjust and unreasonable.

We find that the increased rates and charges are just and reasonable, except that where the resulting rates to intermediate points are higher than the rates to more distant points over the same routes, the former are not shown to be just and reasonable. The schedules will be ordered canceled to the extent found unlawful, without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points in the area here considered. The proceeding will be discontinued.

**Order**

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 20th day of March A.D. 1963.

No. 33652

GENERAL INCREASE—MIDDLE ATLANTIC AND NEW ENGLAND TERRITORIES

*It appearing,* That by order dated January 13, 1961, the Commission entered into an investigation of certain tariff schedules setting forth new increased rates and charges, and new rules, regulations, and practices applicable on interstate and foreign commerce, which became effective on January 16, 1961, and later;

*It further appearing,* That a full investigation of the matters and things involved in this proceeding has been made, and that the said Division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

*It is ordered,* That the respondents herein be, and they are hereby, notified and required to cancel said schedules to the extent found unlawful, on or before May 10, 1963, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 217 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

By the Commission, Divison 2.

HAROLD D. MCCOY
*Secretary*

(SEAL)

## APPENDIX C

### Statutes Involved

Interstate Commerce Act, Section 216(b), 49 U.S.C. § 316(b):

> (b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

Interstate Commerce Act, Section 216(d), 49 U.S.C. § 316(d):

> (d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Interstate Commerce Act, Section 216(i), 49 U.S.C. § 316(i):

> (i) In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of passengers or property by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

Office-Supreme Court, U.S.
FILED
JUN 29 1964
JOHN F. DAVIS, CLERK

**In The**

**SUPREME COURT OF THE UNITED STATES**

October Term, 1964

Case No. [redacted] 131

ACCELERATED TRANSPORT-PONY EXPRESS INC., ET AL.,
*Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

# MOTION TO AFFIRM

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**In The**

**SUPREME COURT OF THE UNITED STATES**

October Term, 1963

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Case No. 1163.

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ACCELERATED TRANSPORT-PONY EXPRESS INC., ET AL.,
*Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

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## MOTION TO AFFIRM

---

The appellee, Lynchburg Traffic Bureau, is a party to this appeal by virtue of having been permitted to intervene in the proceeding before the United States District Court for the District of Vermont by order of said Court.

This appellee hereby moves that the judgment of such District Court be affirmed.

## BACKGROUND AND NATURE OF THE PROCEEDING

The pertinent facts as they appear from the report of the Commission and the opinion of the District Court reproduced as Appendices A and B to the Jurisdictional Statement are so clearly set forth in such report and opinion that they need no extensive recital here.

These appellants, since 1949, have maintained from and to points in Middle Atlantic and New England Territories higher rates at Lynchburg, Virginia, a border point, than the same appellants maintain to more distant points located beyond the border point, Lynchburg. This proposition was brought to the attention of the Commission in 1948 and in its decision in 1949, the Commission, in Increases-Middle Atlantic and New England 49 M.C.C. 357 at page 386, had this to say:

> "The Lynchburg, Va., Traffic Bureau takes the position that the proposed rates are not reasonable or just, and that the record fails to warrant any increase in the present rates. It is stated that any increase in the present rates would only further increase the disparity in the rates now existing at border points between trunk-line territory and southern territory. For example, the present first-class rate on shipments weighing less than 2,000 pounds, between Lynchburg and Baltimore, Md., is $1.35 and the proposed rate $1.49, as compared with the present first-class rate of $1.44 on commodities subject to the classification exceptions ratings, and $1.32 on commodities subject to the classification ratings between Danville, Va., and Baltimore, although the

distance from Danville is 64 miles greater than from Lynchburg to Baltimore. Numerous other border-line disparities are shown. General intraterritorial increases in rates usually result in disparities at border points. *The respondents should take prompt action to eliminate such disparities.*" (Emphasis supplied).

The quotation from the above decisions shows: (a) that higher rates at Lynchburg were applied on shipments moving from Baltimore than appellants applied on the same shipments moving to Danville, Virginia; (b) that Danville is 64 miles south of Lynchburg; and (c) that these appellants were admonished to take prompt action to eliminate rates which are higher at Lynchburg than those to more distant points.

These appellants did not voluntarily make the corrections they were admonished in 1949 to make and in this proceeding, the Commission has ordered these appellants to establish rates at Lynchburg which do not exceed the rates to more distant points. The record in Class Rates Between Middle Atlantic and New England Territories, 67 M.C.C. 741, shows that in 1955 the same problem was present. The Commission, at page 761 of 67 M.C.C. 741 described the condition as follows:

"Between Lynchburg and New York City, 401 miles, the rates on shipments weighing less than 2,000 pounds range from $2.92 on Class 100 to $1.81 on Class 55. The corresponding rates between New York City and Gretna, Va., 425 miles, range from $2.71 to $1.60. Gretna is almost directly south of Lynchburg. Both are on U.S. Highway 29. The example given is said to be illustrative of similar maladjustments at

other points on the border between the two territories. *"The respondents made no defense of such situations.* Higher class rates for lesser distances over the same routes as revealed on this record are clearly unjust and unreasonable. In publishing rates in conformity with our findings in these proceedings, we shall expect the respondents to eliminate all rate discrimination similar to that above described." (Emphasis added)

This decision shows; (1) that higher class rates are maintained at Lynchburg, Virginia than maintained to Gretna, Virginia; (2) that Gretna is 24 miles almost directly south of Lynchburg; (3) that appellants made no defense to charging higher rates at Lynchburg than at Gretna; (4) that the Commission instructed the appellants to eliminate all rate discrimination of charging higher rates at Lynchburg than at Gretna; and (5) that the Commission found that higher class rates for lesser distances over the same route are clearly unjust and unreasonable. It is important to observe, since appellants have raised questions about preference and prejudice, that the Commission did not find that higher rates for lesser distances created undue preference and prejudice but rather found that such higher rates were unjust and unreasonable.

In the above proceeding reported at 67 M.C.C. 741, these appellants agreed to be bound by the decision the Commission rendered therein and by that agreement they were to eliminate rates at border points which were higher than to more distant points. This agreement is found in Class Rates Between Middle Atlantic and New England Territories, 67 M.C.C. 741, where at page 748 is found the following:

"(Footnote) *Effective August 18, 1955, schedules

> increasing the arbitraries to 45 and 20 cents were permitted to become effective, although protested; respondents, however, agreed to be bound by the decision in these proceedings . . ."

Had these appellants complied with their agreement and the decision of the Commission there would be no cause for this appeal. Hence, this appeal is the direct result of a breach of an agreement by appellants and the failure to comply with a decision of the Commission holding prior to 1949 and subsequent thereto that higher rates for lesser distances over the same route are unjust and unreasonable. This agreement itself is sufficient, without more, to sustain the motion to affirm and justify granting the motion.

These appellants had an opportunity in 1955 to justify the disparities and to rebut the presumption that higher rates for lesser distances are unjust and unreasonable if they could do so, but they offered no defense to maintaining higher rates at border points than at more distant points. In Class Rates Between Middle Atlantic and New England Territories supra, it is shown that these appellants were given an opportunity to rebut the presumption that higher rates for lesser distances are prima facie unreasonable. The report at page 748 shows:

> "When the respondents proposed the intraterritorial class rates, in lieu of reducing the arbitraries, which were the same as those just described in connection with the interterritorial class rates prior to December 7, 1953, they increased them to 45 cents, maximum 50 percent of the rate, on shipments weighing less than 2,000 pounds, and to 20 cents, maximum 20 percent of the rate, on shipments weighing 2,000 pounds and less

than 6,000 pounds. The increases were made on the ground that the former arbitraries were too low to compensate the carriers for the additional expenses, over and above the basic rates, incurred in transporting the so-called small shipments. *The respondents then sought by petition to increase the interterritorial arbitraries to the same amounts and to broaden the issues in No. MC-C-1600 accordingly. The petition was denied on the ground that the respondents were at liberty to offer evidence justifying any bases of arbitraries they deemed reasonable.* Their evidence was directed chiefly to showing the necessity for, and the lawfulness of, the increased arbitraries proposed in No. MC-C-1600.'" (Emphasis added)

The above quotation from the decision in the Class Rates Between Middle Atlantic and New England Territories case, supra shows (a) that the disruption between the class rates to Middle Atlantic and New England Territories and between points in these territories and points in southern territory were the creation of appellants by establishing higher arbitraries on shipments weighing less than 6,000 pounds moving between points in Middle Atlantic and New England territories from the arbitraries appellants maintain from points in Middle Atlantic and New England territories to points south of the border; (b) that the Commission denied their petition to bring in issue the interterritorial rates in cases 67 M.C.C. 741; (c) that the appellants were given an opportunity in 1955 to rebut the presumption that higher rates for lesser distances are unjust and unreasonable; and (d) that the appellants made no effort to rebut the aforesaid presumption of unreasonableness.

The Commission in 1960 in Lynchburg Traffic Bureau v.

Smith's Transfer, 310 I.C.C. 503, had before it the charging of higher rates for lesser distances and in that decision at page 506 said:

> "Repeatedly the Commission has found that such rate adjustments are prima facie unjust and unreasonable."

The above outline brings us to this proceeding known as Docket 33652 before the Commission, Civil Action 3883 before the District Court for the District of Vermont and Case No. 1163 before this Court.

In this proceeding as it has been since 1949, the appellants maintain higher rates at intermediate points for lesser distances than to more distant points. The Commission in General Increases-Middle Atlantic and New England, 319 I.C.C. 168, commented at page 177 as follows:

> "A number of instances are shown where the proposed rates are higher to border points within the affected area which are intermediate over the same routes to points outside the area to which lower rates apply. The respondents claim that they are powerless to correct such situations and suggest that the rates to and from the border points be required as minimum rates to and from the more distant points."

The above quotation clearly shows (1) that the disparities in rates at the border points exists in 1963 although these appellants were admonished in 1949 to eliminate such rate disparities at border points; (2) that appellants not withstanding the fact that rates to points beyond the border points were not in issue, yet these appellants sought to get the Commission to hold the rates to and from the border

points as minimum rates to and from the more distant points; and (3) that the appellants are powerless to correct the said rate situation at border points. In view of the action of appellants, as above set forth, they are estopped now to claim that the District Court or the Commission made an error in requiring them to maintain at border points no higher rates than they maintain through the border points to points beyond the border.

The report in the General Increases-Middle Atlantic and New England case 319 I.C.C. 168, deals further with the border situation; where at page 177, the following is found:

> "With respect to resulting higher rates to border points than to points beyond over the same routes, obviously, in accord with prior decisions of the Commission, such higher rates would be unlawful, and we concur in the conclusion of the examiner in this respect that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points. TO THE EXTENT THAT SUCH MALADJUSTMENTS OCCUR, THE INCREASED RATES ARE UNJUST AND UNREASONABLE." (Emphasis added)

In this quotation, the Commission finds; (a) that the resulting higher rates (the addition of the arbitraries of 30 cents and 10 cents to the rates) to and from the border points are unlawful; (b) that the appellants, if they desire to participate in the rates from and to points in Middle Atlantic and New England Territories and points beyond the border, that they should arrange to maintain no higher rates at intermediate points; and (c) that the increased rates are unjust and unreasonable when applied at border points.

It may be appropriate, at this time, to clarify what rates were involved before the Commission in this proceeding. This proceeding is an investigation instituted by order of January 13, 1961, into the lawfulness of general increases in motor common carrier class and commodity rates published to become effective January 16, 1961. The rates applying on less-than-truckload quantities weighing under 2,000 pounds, 2,000 to 5,999 pounds, and 6,000 pounds and over, were increased 30 cents per 100 pounds on shipments weighing under 2,000 pounds, 10 cents per 100 pounds on shipments weighing 2,000 to 5,999 pounds, and 3 cents per 100 pounds on shipments weighing 6,000 pounds and over (319 I.C.C. 168 (169)). The physical application of the increases means that the basic rate on the article shipped, whatever it may be, is increased by 30 cents per 100 pounds on a shipment weighing under 2,000 pounds, by 10 cents per 100 pounds on shipments weighing 2,000 to 5,999 pounds and 3 cents per 100 pounds on shipments weighing 6,000 pounds and over.

The Commission found in this proceeding that when the increases which they suggested for application in the area considered results in higher rates to border or intermediate points than to more distant points, that such higher rates are unjust and unreasonable at the border points to the extent that the rates exceed the rate to a more distant point.

The Commission in this proceeding at page 177 of 319 I.C.C. 168, stated:

> "We find that the increased rates and charges are just and reasonable, except that where the resulting rates to intermediate points are higher than the rates to more distant points over the same routes, the former

> are not shown to be just and reasonable. The schedules will be ordered canceled to the extent found unlawful, without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points in the area here considered . . .

In this proceeding, the Commission found: (1) the arbitraries unjust and unreasonable when applied to the rates to and from border points in instances where the rate to the border point or intermediate points is higher than the rate to the more distant point; (2) that the schedules, containing the arbitraries, made effective January 16, 1961, were ordered cancelled; and (3) appellants could make an amendment so as to provide for the application of the lower rates to more distant points as maxima at intermediate border points.

## THE QUESTIONS PRESENTED

Appellants have set forth three questions in which the question is asked: Did the District Court err in answering in the affirmative the questions presented? The Court made no error.

## QUESTION NO. 1

The difficulty with appellants' position is that the Commission did not find on the record as appellants claim the Commission did, that the increased rates are at a just and reasonable level and properly related to one another. The Commission, as the report shows at page 177, 319 I.C.C. 168, simply found that the arbitraries of 30 cents and 10

cents and 3 cents were just and reasonable between all points *except* that the arbitraries of 30 cents, 10 cents, and 3 cents were not just and reasonable when applied to the rates to and from border points to the extent the resulting rates were greater to those points than the rates to a more distant point. The unlawful rates of which the Commission spoke were the rates appellants sought to establish at border points and not the rates to points beyond the border. It was the duty of appellants to rebut the presumption that higher rates for lesser distances are unjust and unreasonable and failing to rebut that presumption did not give appellants a right, legal or moral, to challenge the report and order of the Commission for their failure to produce evidence, if they could, that the rates to the border points were reasonable and just. The District Court made no error in affirming the report and order of the Commission.

## QUESTION NO. 2

The mere fact that a rate is higher for a shorter distance than for a longer distance raises immediately, in law, the presumption that the higher rate is unreasonable (Patterson v. L & N 269 U.S. 1(11)), and that presumption is raised regardless of the territories in which it exists. Such higher rates do not create undue preference and prejudice without evidence showing such preference and prejudice. In other words, something is wrong when Brooks Transportation Company or Associated Transport, Inc. will charge a rate to Lynchburg of 381 cents for 400 to 420 miles from points in Middle Atlantic Territory and only charge 362 cents through Lynchburg to Gretna for a distance of 420 to 440 miles from points in the same Middle Atlantic Territory. The rate for 400 to 420 miles, before the addition of 30 cents is 351 cents per 100 pounds and

the rate through Lynchburg to Gretna for 420 to 440 miles is 362 cents. In other words, the addition of the arbitrary to the rate to the border points is the cause for higher rates at Lynchburg than to Gretna, as the rate without the arbitrary is less at intermediate points than to more distant points. The Commission found the arbitraries unjust and unreasonable when applied at intermediate points because the arbitraries created the higher rates at intermediate points.

## QUESTION NO. 3

The District Court did not in holding that if appellants chose to participate in lower rates to more distant points that such lower rates should be held as maxima at intermediate points. This holding is supported by the decision in Patterson v. L & N 269 U.S. 1. It is the statutory duty of the Commission not to permit the publication of rates which violate any provision of the law. Here the higher rates at intermediate points did violate the Act and many decisions of the Commission holding such rates, as those involved in this proceeding, to be unreasonable. These decisions were made by the Commission in the discharge of its statutory duty and they are supported by substantial evidence.

## PREFERENCE

The issue in this case was the lawfulness of the arbitraries of 30 cents, 10 cents, and 3 cents depending upon the weight of each shipment and not the level of the rates. The issue of preference and prejudice was not involved in this proceeding. The report of the Commission shows that the proposed increases were flat amounts to be added to the rates on less-truckload quantities of under 2,000 pounds.

2,000 to 5,999 pounds, and 6,000 pounds and over, and the proposed increases were for 100 miles and over 30 cents, 10 cents, and 3 cents respectively (Jur. S. 16a). In the report the Commission stated that the increased rates are unjust and unreasonable to the extent that they result in higher rates at intermediate points than to more distant points (Jur. S. 28a). The record, therefore, shows that the District Court was correct in holding that the Commission did not purport to find that the rates resulted in undue preference or prejudice and that such a finding was not necessary for the decision reached or to the validity of the order (Jur. S. 10).

Section 216(d) of the Act requires above everything else that all rates must be just and reasonable and that every unjust and unreasonable rate is declared to be unlawful. Hence, the proposed rates to the border being higher for shorter distances than for longer distances are unjust and unreasonable as a matter of law as this Court has held that aside from statutory enactment it is prima facie unreasonable to charge more for a shorter haul than for a longer haul (See Patterson v. L. & N 269 U.S. 1(11)). These appellants have had over 15 years in which to justify charging more for a shorter haul than for a longer distance and they have never rebutted the presumption that the higher rates at intermediate points are unreasonable. Hence, there is no valid grounds on which these appellants can attack the decision of the District Court or of the Commission. In view of the above and since it is not the function of the Court to pass upon the measure of rates or to set aside an order of the Commission unless the order is not supported by substantial evidence, there is no merit to the appeal of appellants. There is no evidence of record showing that higher rates at intermediate points than to more distant

points are reasonable and just at the intermediate points, but there is abundant evidence of record showing such higher rates to be unjust and unreasonable. The District Court was correct in affirming the report and order of the Commission. There is no merit to the position of appellants and the motion to affirm should be granted.

## CONCLUSION.

Appellee, Lynchburg Traffic Bureau, could answer each challenge appellants made or can make against the order of the District Court and the report and order of the Commission. However, this appellee sees no reason to further show that there is no merit to the petition of appellants. The short answers are: (1) that these appellants have been given an opportunity to justify the maintenance of higher rates at intermediate points than to more distant points during the past 15 years (49 M.C.C. 357 in 1949 to 319 I.C.C. 168 in 1963 including 67 M.C.C. 741 in 1956), but appellants rather than to justify, if they could, the unlawful rates, contend that they are powerless to do anything about it (319 I.C.C. 168, Jur. S. 24a). The decision of the Court in Patterson v. L & N 268 U.S. 1 declares the higher rates for lesser distances are prima facie unreasonable and that finding requires the appellants to justify such higher rates otherwise to apply no higher rate at intermediate points than the rate to the point beyond the intermediate point. Hence, since appellants are unable to rebut the presumption of unreasonableness, the motion to affirm should be granted as appellants claim they are powerless to correct this condition; and (2) these appellants are barred and estopped from contending that the report and order of the Commission and of the District Court are erroneous. In 1955 these appellants informed the Commission and members of the

public including this appellee that they agreed to be bound by the decision of the Commission in Docket MC-C-1600, 67 M.C.C. 741 (748) and in that case the decision of the Commission was that higher rates for lesser distances over the same route are clearly unjust and unreasonable and the Commission further stated that they expected the appellants to eliminate all such rate disparities when appellants published the rates the Commission suggested that appellants may publish (67 M.C.C. 741, p. 748 and 761, Class Rates Between Middle Atlantic and New England Territories). The appellants did publish the arbitraries the Commission suggested and that acceptance and publication barred the appellants to the obligation of removing the higher rates at intermediate points, even without an order. The order in this case is justified by the record here and the agreement of appellants made in 67 M.C.C. 741. The motion should be granted.

Respectfully submitted,

LYNCHBURG TRAFFIC BUREAU

By: W. G. BURNETTE
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June 27, 1964

## CERTIFICATE OF SERVICE

I, W. G. Burnette, attorney for Appellee, hereby certify that I have this 27th day of June, 1964, served a copy of the foregoing document upon the Appellants by mailing a copy thereof to:

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# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 131

ACCELERATED TRANSPORT—PONY EXPRESS, INC., ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

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**On Appeal from the United States District Court For the District of Vermont**

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## MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from a judgment (J.S. 13a) of a three-judge district court dismissing appellants' suit to set aside an order of the Interstate Commerce

Commission entered in *General Increase, Middle Atlantic and New England Territories*, 319 I.C.C. 168. The Commission disapproved, as not shown to be just and reasonable under Section 216(d) of the Interstate Commerce Act, 49 U.S.C. 316(d), certain portions of a schedule of rate increases filed by appellant Middle Atlantic Conference on behalf of its carrier members.

The proposed rate schedule established a general increase in motor carrier class and commodity rates between points within Middle Atlantic Territory,[1] and between points in Middle Atlantic and New England Territories.[2] The increases were opposed by a number of shippers and shipper organizations, including those who appear as appellees herein. After full administrative proceedings, the Commission (Division 2) concluded that the evidence of costs and revenues generally supported the proposed increases (J.S. 28a).

The Commission further concluded, however, that the increases were not shown to be just and reasonable insofar as they result in "higher rates to border points than to points beyond over the same routes" (J.S. 28a). It noted that the record revealed a number of instances in which the proposed increases would result in a higher rate for a shorter haul to a border

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[1] "Middle Atlantic Territory" includes New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, the District of Columbia, and parts of Kentucky and Tennessee.

[2] "New England Territory" includes Maine, Vermont, New Hampshire, Massachusetts, Connecticut, and Rhode Island.

point located within Middle Atlantic Territory than for a longer haul, *through* the border point, to a point beyond located in a different territory. (J.S. 24a). Referring to its numerous prior decisions[1] condemning motor carrier rates which result in higher rates for shorter than for longer hauls over the same routes, the Commission held that "if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points" (J.S. 28a). The order of the Commission required cancellation of the rate schedules, "to the extent found unlawful, without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points" (J.S. 28a).

The three-judge district court unanimously sustained the Commission's decision. The statute, it stated, requires the carrier to sustain the burden of proving that a proposed rate change is just and reasonable. Moreover, it is prima facie unreasonable, under the controlling decisions, for a carrier to charge more for a shorter than for a longer haul. The court observed that the carriers did not proffer evidence of segregated costs bearing on the particular challenged rates found unreasonable, nor claim that the

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[1] For example, the Commission in *Class Rates, Middle Atlantic & New England Territories*, 67 M.C.C. 741, 761, had condemned as "clearly unjust and unreasonable" a rate on particular groupings of $2.92 for hauling goods from New York City to Lynchburg, Va., as compared with $2.71 for hauling the same goods from New York City *through* Lynchburg to Gretna, Virginia. Other decisions are cited at p. 5 *infra*.

disapproval of these rates would make them unremunerative. It accordingly ruled that they had failed to meet their burden of proof (J.S. 8a).

## ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court. Appellant is merely seeking to avoid a burden of proof which has been invariably imposed upon carriers proposing rates which result in lesser charges for longer hauls than for shorter hauls along the same route. Section 216(d) of the Interstate Commerce Act (49 U.S.C. 316(d)) provides that "All charges made for any service rendered or to be rendered by any common carrier by motor vehicle . . . shall be just and reasonable", and it is well settled that "it is *prima facie* unreasonable to charge more for a shorter than for a longer haul", *Patterson* v. *Louisville & N.R.R.*, 269 U.S. 1, 11. With respect to railroads, Section 4 of the Interstate Commerce Act has, since the Act's inception, specifically provided that a greater charge for a longer than for a shorter haul along the same line is unlawful unless the carrier can establish that special circumstances exist which justify this long haul-short haul departure. That section merely reflects the view that this is a type of discrimination so patent as to warrant specific condemnation: *Mechling Barge Lines* v. *United States*, 376 U.S. 375, 385; Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 884. As this Court has pointed out, a specific statutory proscription is not necessary

to establish that the practice is *prima facie* an improper one. *Patterson* v. *Louisville & N.R.R.*, *supra*.

Accordingly, since the enactment of the Motor Carrier Act of 1935 the Commission has therefore consistently held that higher rates for shorter hauls than for longer hauls are presumptively unreasonable. *E.g.*, *Fifth Class Rates Between Boston, Mass., and Providence, R. I.*, 2 M.C.C. 530, 546; *Electric Storage Batteries from Kansas to Missouri*, 46 M.C.C. 729, 732; *Middle West Exceptions Ratings, Cancellation*, 48 M.C.C. 53, 57-58.[4] For the Commission to treat this type of apparent discrimination as requiring justification is well within its discretion as an expert in rate regulation. The appellants were on notice, consistent with the Commission's practice, that they would bear a special burden in connection with those aspects of its proposed rates which would result in lesser charges for longer than for shorter hauls. Appellants nonetheless failed to present evidence to rebut the presumptive unreasonableness of such rates (J.S. 7a).[5] Since they failed to sustain their burden,

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[4] In at least two prior proceedings, rates filed by the Middle Atlantic Conference have been condemned by the Commission for disparities at the same border points which are here involved. *Increases, Middle Atlantic & New England, 1948*, 49 M.C.C. 357, 366; *Class Rates, Middle Atlantic & New England Territories*, 67 M.C.C. 741, 761.

[5] The *Maggioni* case, relied upon by appellants (J.S. 11-12) in support of their contention that a general showing of reasonableness was sufficient to rebut the presumption, is inapposite, as the ground upon which the presumption was there held rebutted was that the Commission itself, pursuant to its authority under section 15 to prescribe reasonable rates for ~~mail~~ carriers, had previously *prescribed* an even higher Rail

it is irrelevant that the Commission did not also find that the rates involved were "unduly" preferential. Compare *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793, 800; *Market Street R. Co.* v. *Railroad Comm'n*, 324 U.S. 548, 559.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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JULY 1964

maximum rate to the intermediate point. Furthermore, both the *Maggioni* case and the lower court decision in *Patterson* (J.S. 11) involved claims for reparations, as to which far stricter standards of proof, as to both unreasonableness and damages, must be met by a complaining shipper.

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No. 131

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963/1964

ACCELERATED TRANSPORT-PONY EXPRESS, INC., *et al.*,

*Appellants,*

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

## MOTION TO AFFIRM

**THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.**
**DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE**
**EASTERN INDUSTRIAL TRAFFIC LEAGUE, INC.**

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July 30, 1964

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1963**

ACCELERATED TRANSPORT-PONY EXPRESS, INC., *et al.*,
*Appellants,*

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *et al.*,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

## MOTION TO AFFIRM

Appellees, The National Small Shipments Traffic Conference, Inc.; Drug and Toilet Preparation Traffic Conference; and Eastern Industrial Traffic League, Inc., intervened as defendants in the action below pursuant to 28 U.S.C. §2323, as associations of shippers and receivers of freight who were parties to the proceeding before the Interstate Commerce Commission in which the order under review was made. Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, these appellees move that the judgment of the District Court be affirmed on the ground that the question presented is so unsubstantial as not to warrant further argument.

## Statement

This is a direct appeal from the judgment of a three-judge district court which dismissed appellants' complaint seeking to set aside an order of the Interstate Commerce Commission issued in an investigation of general increases of motor carrier rates.

Appellants published schedules increasing motor carrier rates within Middle Atlantic Territory and between that territory and New England Territory.[1] The Commission ordered an investigation and, after hearing and further proceedings, concluded that the proposed increases were in general just and reasonable. In some respects, however, it found that the increased rates were not shown to be just and reasonable. The record disclosed instances of rates higher for short hauls within Middle Atlantic Territory than the rates charged by the same carriers for longer hauls over the same routes to or from points in adjacent rate territories. These disparities between intraterritorial and interterritorial rates generally occurred at or near the borders of Middle Atlantic Territory. They are referred to as border point disparities. Thus, the rates from Baltimore to Lynchburg, Virginia (near the border of Southern Territory), were higher than rates over the same routes to Greensboro, North Carolina, 114 miles south of Lynchburg. The former is an intraterritorial movement within Middle Atlantic Territory; the latter is interterritorial to Southern Territory. Rates

1. The boundaries of these territories are defined in *Class Rates, Middle Atlantic and New England Territories*, 67 M.C.C. 741, 743 (Footnotes 4 and 5). Generally stated, Middle Atlantic Territory includes New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, the District of Columbia, parts of Kentucky and Tennessee. New England Territory includes Maine, Vermont, New Hampshire, Massachusetts, Connecticut and Rhode Island.

from Canton, Ohio, to New York (in Eastern Central Territory) were lower than rates from Titusville, Pennsylvania, to New York (in Middle Atlantic Territory), although Titusville was 65 miles closer to New York than Canton. Repeatedly in earlier investigations, the Commission had admonished the carriers to eliminate such disparities.[2] The increase proposal here presented to the Commission for approval markedly accentuated the disparities. Thus, the Class 100 rate on shipments weighing 1,000 pounds, from New York, N. Y. to Bristol, Virginia, was, prior to the increase, $4.17 for a haul of 619 miles, while the rate to further distant Johnson City was $4.13 for a haul of 644 miles. Appellants' schedules increased the rate to Bristol to $4.47 so that what was formerly a 4-cent disparity in relation to Johnson City was increased almost ninefold to a 34-cent disparity. The schedules under investigation were replete with relationships of this kind.

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2. In *Increases, Middle Atlantic and New England, 1948*, 49 M.C.C. 357, 366, the Commission cited the prevalence of these disparities and stated: "The respondents should take prompt action to eliminate such disparities."

In *Class Rates, Middle Atlantic and New England Territories*, 67 M.C.C. 741, 761, the Commission again adverted to border point disparities and stated: "The respondents made no defense of such situations. Higher class rates for lesser distances over the same routes as revealed on this record are clearly unjust and unreasonable. In publishing rates in conformity with our findings in these proceedings, we shall expect the respondents to eliminate all rate disparities similar to that above described."

In *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, 310 I.C.C. 503, 506, the Commission referred to the cited cases and stated: "While some effort has been made by the [Middle Atlantic] Conference to correct the maladjustments thus twice found to exist, they are still reflected in some of the present rates. . . . Repeatedly, the Commission has found that such rate adjustments are prima facie unjust and unreasonable . . . The carriers concerned are again admonished to remove promptly any such disparities that may still exist in these border-point rates."

The Commission thereupon made these findings:

> "We find that the increased rates and charges are just and reasonable, except that, where the resulting rates to intermediate points are higher than the rates to more distant points over the same routes, the former are not shown to be just and reasonable."

It ordered the rate schedules canceled to the extent found not shown lawful without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points (JS 28a).

This issue and the Commission's determination thereof form the basis of the Federal Court action. Willing enough to accept the Commission's approval of the increased rates generally, appellants level this attack on the finding and conclusion that rates higher for short than long hauls are not shown just and reasonable and on the Commission's direction to cancel the schedules to the extent found unlawful.

The three-judge District Court unanimously sustained the Commission's decision. Indeed, at the conclusion of hearing and argument, the Court, after recessing for deliberation, *sua sponte* ordered dissolution of the restraint on the Commission's order while reserving judgment on the merits of the complaint on the ground that it considered the probability of appellants prevailing on the merits insufficient to warrant continuance of the restraining order.

Appellants thereupon applied to the Supreme Court for a stay of the Commission's order pending appeal from the District Court's judgment, Mr. Justice Harlan denied the stay, with leave to renew if the Court notes probable

jurisdiction. In a memorandum issued March 9, 1964, he stated:

> "I conclude that neither the probabilities respecting the outcome of appeal nor the equities point sufficiently convincingly in appellants' favor to justify the granting of a stay at this stage."

The Court suggested that appellants could expedite consideration of the matter by accelerating the filing of their jurisdictional statement. Appellants did not file their jurisdictional statement until May 29, 1964, approximately three months later. In the interim, the Commission, by order dated March 26, 1964, reinstated its order and required appellants to comply by June 26, 1964. Tariffs were filed on May 20, 1964, purporting to comply with the Commission's order. Shipper leagues petitioned the Commission to reject such tariffs for non-compliance and appellants petitioned the Commission for an order approving their filed tariffs as in compliance. Both petitions were denied. Appellants' tariffs purporting to comply became effective June 26, 1964.

## Argument

This case presents no substantial question warranting plenary consideration by this Court.

### 1. *The Commission's determination conformed to statute and regulatory criteria.*

The Commission's order found the increased rates lawful in the main, but in some respects unjust and unreasonable. In a revenue proceeding this is not at all extraordinary. Railroad and motor carrier increases are multi-faceted proposals. That added revenues are needed; that proposed increases do not exceed reasonable maxima

—do not exclude the possibility that particular elements of the proposal may be improper. In such a case, the Commission approves the increases to the extent found just and reasonable and excises those elements found not shown just and reasonable.[3] The increases as a whole were found not in excess of reasonable maxima, but rates higher to intermediate points than to more distant points over the same routes were found not shown to be just and reasonable. These findings conform to well-established principles enunciated in an unbroken line of decisions. The doctrine was concisely stated by Mr. Justice Brandeis in *Patterson* v. *Louisville & N.R.R.*, 269 U. S. 1, 11:

> "Apart from statutory enactment, it is *prima facie* unreasonable to charge more for a shorter than a longer haul."

If railroad common carriers, *prior* to statutory enactment, are held to such a rate restriction, the same must be true of motor common carriers under a regulatory statute that contains no express prohibition. The Commission so held in *Kingan* v. *Olson*, 32 M.C.C. 10, citing *Patterson, supra*. In *Kingan*, the Commission said:

> "The same principles that governed rail rates under such circumstances prior to the 1910 amendment are applicable to similar conditions involving motor carrier rates. Therefore the assailed joint rates are presumed to have been unreasonable to the extent that they exceeded the corresponding aggre-

3. In Ex Parte No. 175, *Increased Freight Rates, 1951*, 297 I.C.C. 17, 51, the Commission found a need for added revenues and that rates increased 15 percent were just and reasonable. In the same order, it found not shown just and reasonable increases proposed on some 30 items and directed the imposition of maxima on such excepted items found not shown reasonable.

> gate of intermediate rates. Defendants submitted no evidence to rebut this presumption." [The aggregate of intermediates violation referred to is *pari materia* with long and short haul violations.]

The presumption of unreasonableness was not rebutted by appellants. This is made clear by the Examiner's discussion of the evidence and the Commission's findings. It was observed that the carriers first pleaded no defense of the situation and later attempted to defend it on the ground that other carriers controlled the rates. This defense was rejected on two explicit grounds: (1) the circumstances recited by the carriers concerning maintenance of the interterritorial rates do not relieve them of individual responsibility; and (2) the carriers are in a position to control their individual rates. This is a determination that the presumption of unreasonableness has not been rebutted. The result, under long-established rule, is that the rate disparities must be held unjust and unreasonable.

Appellants seek to apply standards and criteria appropriate to an undue prejudice case. The Commission's findings, however, were explicitly that rates to intermediate points higher than the rates to more distant points over the same routes "are not shown to be *just and reasonable*". Undue prejudice and preference, a distinct species of rate regulation (U.S.C. §316(d)), formed no part of the Commission's findings and were not necessary to the determination reached or to the validity of the order. In dealing with mal djustments at intermediate points, the Commission exercised its authority under the reasonableness requirements of the law (U. S. C. §316(b)).

Long and short haul violations sound in unreasonableness. They have uniformly been characterized in those

terms by Court and Commission. In *Patterson* v. *Louisville & N. R.R., supra,* Justice Brandeis declared it is prima facie "unreasonable" to charge more for a shorter than a long haul. In *Atlas Portland Cement* v. *N. & R. R.R.*, 120 I.C.C. 583, 585, Commissioner Eastman described the higher charge for the shorter haul as "unreasonable". In the very territory here involved, of the same sort of border violations as are here in issue, the Commission stated, *Class Rates, Middle Atlantic and New England Territories,* 67 M.C.C. 741, 761:

> "Higher class rates for lesser distances over the same routes as revealed on this record are clearly unjust and unreasonable."

This was the express finding of the Examiner in the instant case. It was the finding made by the Commission. Based on this finding, the Commission exercised its authority to make an order under §316(e):

> "Whenever, after hearing . . in an investigation . . . the Commission shall be of the opinion that any individual or joint rate . . . is or will be unjust or unreasonable . . . it shall determine and prescribe the lawful rate, fare, or charge or the maximum or the minimum . . . rate, fare or charge thereafter to be observed, . . ."

To inject into a case involving an issue uniformly characterized as one of rate reasonableness, the evidentiary requirements of an undue prejudice complaint, is a gratuitous undertaking. Yet that is the nature of appellants challenge to the Commission's order and the major preoccupation of their argument. The evidence considered by the Commission and the findings made by it emanated not from undue prejudice but from rate unreasonableness.

This is clear from the Commission's ultimate finding and conclusion—"To the extent that such maladjustments occur, the increased rates are unjust and unreasonable." Criteria of undue prejudice, elaborated at length by appellants, are irrelevant to that determination.

In *Middlewest Exceptions Ratings—Cancellation*, 48 M.C.C. 53, 57, the Commission dealt with similar maladjustments. It condemned rates higher for short intraterritorial hauls than for longer interterritorial hauls. It stated:

> "Such rates are prima facie unreasonable. Respondents have the burden, under section 216(g) of the Interstate Commerce Act, of showing that the proposed changed ratings are just and reasonable. They have not sustained this burden. The maladjustments and disparities in the rates which would result from the proposed ratings compel the conclusion that the proposed schedules are unlawful."

In the *Middlewest* case, the Commission condemned the disparities as unreasonable even though it affirmatively appeared that findings of undue preference and prejudice could not be made (48 M.C.C. 53 at 57).

Appellants lean heavily on *United States* v. *Chicago, M. & St. P. R.R.*, 294 U. S. 499, and *State of New York* v. *United States*, 331 U. S. 284. *Chicago* involved rate reductions assailed as disruptive of the rate structure on coal between particular points The *New York* case was an investigation instituted by the Commission into class rates and classifications in railroad territories. Neither case is responsive to issues entailed in a revenue proceeding involving general increases in the rates. Appellants themselves are at pains to argue the distinction between

a revenue case and a rate case. Appellants declare (JS 14):

> "The problem in revenue cases is to determine whether the rates under investigation are 'below the lowest or above the highest reaches of reasonableness.' The problem in rate relationship cases is to determine whether the relationships under investigation result in discrimination or preference or prejudice."

The *Chicago* case and the *New York* case, *supra*, were both rate cases. This is a revenue proceeding. In this proceeding, the Commission examined the proposed increases, found them not in excess of maximum reasonable rates in the presence of a need for added revenues. It approved the increased rates so found just and reasonable but, observing improprieties in the proposed increases in the prevalence of rates higher for short than for longer hauls at border points, it found such disparities not shown just and reasonable and ordered them canceled. For this determination, the District Court found "There is ample warrant in the evidence and the statute . . ." (JS 11a).

Appellants' disclaimers of responsibility for the rate disparities and protestations that they are powerless to control them are contradicted by the evidentiary record on the basis of which the Commission found that the appellants were responsible for the disparities and had it within their power to remove them, by independent action if necessary. Indeed, events which followed the District Court's dissolution of the restraint on the Commission's order and this Court's denial of a stay—i.e., publication of tariffs by appellants accompanied by assertions that they constituted compliance with the Commission's order (*supra*, p. 5)—furnish an apt commentary on the Com-

mission's discernment in rejecting appellants' pleas of impotence and its insistence that it *was* within appellants' power to remove the interdicted disparities.

**2. *The decision of the District Court is clearly correct.***

In an opinion which fully considered appellants' contentions, the three-judge District Court unanimously sustained the Commission's decision (JS 1a).

The Court first dealt with these contentions (JS 5a): (1) the "presumption" merely shifted the burden of going forward with proof; and (2) even if the disparities have probative value as evidence of unreasonableness, the evidence as a whole does not support a finding that they are unreasonable. The District Court discusses these contentions in light of the prohibition of §316(d) of unjust and unreasonable charges and the burden of proof imposed on carriers by §316(g) to show that proposed changed rates are just and reasonable (JS 6a).

Applying these statutory standards obviates the need for resort to the theory of presumptions elaborated by appellants. The Court adverts to the long-established principle that rates higher for short than long hauls significantly affect their reasonableness. This Court enunciated the doctrine in *Patterson, supra,* and the Commission has followed it and consistently applied it in motor carrier rate-making since the earliest days of motor regulation (JS 7a).

The Court notes that appellants presented no "evidence of segregated costs for the particular traffic" or other factors that might justify higher rates for shorter hauls at border points (JS 7a), nor do they claim that, without the border point increases, the general increases approved

by the Commission are unremunerative (JS 8a). The Court sees no inherent inconsistency between findings that increased rates of the carriers as a whole were just and reasonable, while the border point disparities were not. Appellants signally failed to support their burden of showing that the border point rates were just and reasonable (JS 8a).

The Court terms appellants' effort to inject the issue of undue prejudice as irrelevant to the issues or proof in this case. The Commission's report is "unmistakably clear" that the basis for condemning the border point disparities is that they were not shown to be just and reasonable. Findings of undue prejudice were neither made nor were they necessary to the validity of the order (JS 10a).

Appellants' contention that they had no control over rates beyond the border "was specifically rejected by the Commission" (JS 11a). The Court finds no meritorious legal basis for attack on the Commission's order that the schedules be cancelled to the extent found unlawful, without prejudice to their amendment. It concludes there is ample warrant in the evidence and statute for the Commission's findings and conclusion and orders the complaint dismissed (JS 12a).

### 3. *Appellants' position is based on misconceptions of the facts as well as of the controlling authorities.*

#### (A) The Commission's Findings

Appellants' contention that the Commission's findings as to border point disparities cannot co-exist with findings approving the increases in other respects, rests on

exceedingly insecure factual predicates. They complain that the Commission, having found on the record that "the rates are at a just and reasonable level and properly related to one another", nevertheless ordered canceled certain rates at border points that were higher for short than for longer hauls. The argument is that, if the Commission places the seal of its approval on the carriers' increase schedules with respect to revenue need and the distribution of increases among various categories of traffic (¶16, Complaint), it is inconsistent with such a determination to find rate disparities at border points unjust and unreasonable. To order their cancellation, it is contended, is therefore arbitrary and capricious (¶17, Complaint).

Appellants go to some lengths to construct this argument. Thus, in ¶16 of the Complaint they allege that the Commission in its report made these distinct findings: (1) that the carriers were in need of added revenues; (2) that the rates in issue would not produce revenues in excess of that need; (3) that the rates justly and reasonably distributed the burden of meeting the need among the various categories of traffic. This enumeration of "findings" is pursued even further in the Jurisdictional Statement which declares (JS 5) the Commission also found that the increased rates "were properly related to one another". Appellants' brief to the District Court asserted that the Commission "specificaliy" so found (p. 17). The Jurisdictional Statement omits the word "specifically".

An examination of the Commission's report discloses no such enumeration of findings. Everything the Commission said by way of findings and conclusions on this issue

appears at page 177 of its report (JS 28a). The findings articulated are these:

1. flat-sum increases are not inherently unlawful;
2. using carriers' cost estimates, increases on shipments under-6,000 pounds do not produce rates which exceed reasonable maxima;
3. resulting higher rates to border points than to points beyond over the same routes are unjust and unreasonable;
4. the increased rates are just and reasonable except that higher rates to intermediate points than to more distant points over the same route are not shown to be just and reasonable.

No findings were made, as argued by appellants, that the rates would not produce revenues in excess of need or that the rates were properly related to one another. Indeed, indications in the report are that the rates exceed revenue need by substantial margins. This was admitted by the carriers as to the truckload rates (Examiner's Report, sheet 13) and is apparent from Appendix C to the Commission's report. At page 174 (JS 22a), the report notes that Class 70 is considered the average rating of less-truckload shipments. Appendix C (319 I.C.C. 168 at 180) discloses that the increased Class 70 rates are very substantially in excess of single-line revenue need (including 7 percent profit) for all distances longer than 25 miles. This covers rates on less-truckload shipments in all weight categories. Thus, Appendix C reveals that Class 70 rates exceed revenue need (including 7 percent profit) by about 12 percent for shipments under-2,000 pounds; by more than 20 percent for shipments in the 2,000-5,999-pound category; by as much as 49 percent in the under-6,000-pound category.

As for the 'finding" that the rates in issue were properly related to one another, the Commission's express findings with respect to border point maladjustments dispels any such motion. The Commission neither made such a finding nor was it obliged to.

**(B) Interterritorial Rates Not In Issue**

In arguing that a finding of undue prejudice could not here be made, appellants extract from context in the Commission's report the statement that interterritorial rates are not here in issue (JS 6; 12). It is interesting to observe that the statement "interterritorial rates are not here in issue" was first the Examiner's, and later, the Commission's answer to the proposition put by a carrrier witness that the Commission should deal with the border point disparities by requiring interterritorial rates to be raised. The Commission's answer was direct and forthright:

> (1) the Middle Atlantic rates—not the interterritorial rates—are in issue;
>
> (2) the carriers participating in the tariffs are not relieved of responsibility for the rate anomalies;
>
> (3) they control the rates and, by independent action, if need be, they can remove the rate disparities.

Appellants' reliance on the quoted statement is linked to its argument that findings of undue prejudice are necessary and cannot here be made. It invokes assumptions and conjectures that rates for the longer interterritorial hauls may be too low. Such assumptions cannot be held to disable the Commission from dealing effectively with maladjustments and rate disparities found unjust and unreasonable in the investigation proceeding to which the carriers are party. In *Fleet Lines, Inc.* v. *Northern Transporta-*

*tion Co.*, 54 M.C.C. 575, the Commission answered an argument that rates to the further distant point were unreasonably low. It pointed out that it was the higher rate at the intermediate point that was in issue and that rate was found unreasonable in exceeding the rate for a longer haul.

In *Oklahoma Portland Cement* v. *M.K.T.R.*, 139 I.C.C. 685, the Commission adverted to the possibility that the lower rate to the distant point "might well be" lower than a reasonable maximum rate. That possibility notwithstanding, the Commission held that prima facie the higher rate to the intermediate point was unreasonable and if not rebutted becomes unlawful.

**(C) Revenue Case v. Rate Case**

Appellants draw distinctions between a revenue case and a rate case (JS 12) and then quote from §316(i) as providing governing criteria for a revenue case such as this (JS 13). In quoting, appellants inexplicably omit the prefix to §316(i)—"In the exercise of its power to prescribe just and reasonable rates • • •". They also neglect to include the vital phrase "among other factors" which appears in this section among the elements the Commission is to consider in addition to public need for adequate service and carrier need of sufficient revenues. Quoting a rate-making rule so emasculated, appellants attack as erroneous the Court's holding that there was no inconsistency between the Commission's finding that higher rates to border points were not shown just and reasonable and its finding that increased rates of the carriers as a whole were reasonble (JS 13).

There is no inconsistency. The late Commissioner Clyde B. Aitchison in "Fair Reward and Just Compensation" (p. 5) observed that the differences between revenue and

rate cases are largely those of emphasis. "In either case the resulting rates must be just and reasonable, and otherwise in conformity with the Act".[4] This, of course, is the meaning of the presence of "just and reasonable" and "among other factors" in the rate-making rule. It is also the answer to appellants' contention that the statute's standards may be satisfied by showing that the intraterritorial rates were within the zone of reasonableness. This may evidence that the level of the rates is reasonable. It notably fails, in the case of rates higher for short than for long hauls, to satisfy the requirement that they be "just". The prohibitions of §316(d) reach rates that are unjust as well as those that may be unreasonable. It is not essential to resort, in this case, to the undue prejudice provisions.

4. C. Aitchison cites *United States* v. *State of Louisiana*, 290 U. S. 70, 76-78, and *King* v. *United States*, 344 U. S. 254, 275-276. In *Louisiana*, the Court, dealing with the legislative ancestor of §15(a)(2), held that the Commission, in raising rates to yield a fair return, exercised its powers to prescribe just and reasonable rates and had reasonable latitude to modify or adjust any particular rate it may find to be unjust or unreasonable. This power, under §15(a)(2), was carried over to intrastate discrimination under §13(4) held to be under the same standard of reasonableness. Thus, under §13(4), as under §15(a)(2), reasonable latitude must be given for modification of particular rates found to be unreasonable. Since that decision in 1933, the rate-making rule of §15(a)(2) was further amended and the proviso eliminated. Nevertheless, in *King* v. *United States* decided in 1953, after §15(a)(2) was amended so that it is substantially in accord with §316(i), the Court stated: "Where the Commission seeks to deal generally with rates and revenues in a large area on evidence typical of the area as a whole, it may proceed by way of a general order supported by sufficient evidence applicable to the whole territory. At the same time, it is well for it to leave the way open, as it did here, for modifications of that general order in specific situations where the general order is not *justly* applicable." (emphasis added).

**(D) Patterson v. L. & N. and the Maggioni Case**

Appellants brush past the enduring precept enunciated by this Court in *Patterson* and light upon a view expressed at an earlier stage of that suit by the Circuit Court, viz., as the Commission had found the charge not unreasonably high, the presumption that a through rate in excess of the aggregate of intermediate rates is unreasonable, had been rebutted. The actual decision of the Circuit Court was grounded on complainants' failure in that case to prove their pecuniary damage. This was the crux of the matter as indicated by the Circuit Court: "It is necessary to consider only one point here involved, namely, whether a suit for damages can be maintained under the set of facts stated in the petition and exhibits, without some allegation of special damage to each of complainants." 2 F. (2d) 592, 593. When the cause reached the Supreme Court, it became clear that the alleged violation of §4 (as amended in 1910 to prohibit higher through rates than the aggregate of intermediates) had been protected by an application, timely filed, for relief. This Court then held, there can be no recovery under §4 and there is no occasion to consider whether damages were recoverable without proof of pecuniary loss. The Court pointedly declined to accept the dictum of the Court below as to whether the presumption that the higher through rate is unreasonable is rebutted by a Commission finding that the charge is not unreasonably high. It said (269 U. S. 1 at 8):

> "We have, therefore, no occasion to pass upon the effect of the finding that the through rates were 'not unduly high' e on the other questions discussed by counsel bearing upon liability under §1."

Frail though this straw is as support for appellants' position, they seize it and argue that the Commission, in

*Maggioni & Co.* v. *Atlantic Coast Line R.*, 272 I.C.C. 127, adopted the Court of Appeals' dictum (JS 11). Appellants quote from the Commission's report, the statement that any presumption of unreasonableness is rebutted by the fact that the rate to the intermediate point is below a basis "recognized as a reasonable maximum by this Commission" (JS 12). Appellants neglect the significant statement that appears in the preceding paragraph of the Commission's report (272 I.C.C. 127 at 131): "The first-class rate is that *prescribed* in the western-southern revision" (emphasis added). The significance of the prescription is that, under the doctrine of *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, reparation cannot be awarded where a maximum reasonable rate had previously been prescribed and the assailed rate did not exceed it. This is manifestly what the Commission meant in *Maggioni* when it spoke of "a basis recognized as a reasonable maximum by this Commission". This provides scant support for appellants' view that *Maggioni* "holds that the presumption * * * is rebutted by a showing that the higher rates are themselves within the zone of reasonableness". *Maggioni* can only be accepted as holding that reparation cannot be recovered where the higher assailed rates were Commission-prescribed.

Nor does *Oklahoma Portland Cement Co.* v. *N.K.T.R.*, *supra*, lend substance to appellants' contention that the presumption of unreasonableness has here been rebutted. *Oklahoma* restates the principle that higher rates to intermediate than to further distant points are prima facie unreasonable. It lays emphasis on the rebuttable nature of the presumption, observing that "it might well be that the rate to such further distant point is lower than a

maximum reasonable rate". That possibility notwithstanding, the Commission declares:

> "But in such situations there is a prima facie presumption that the higher rates to the intermediate points are unreasonable. In *Lee Farms Co. v. L. & N. R.R. Co.*, 93 I.C.C. 699, division 4, in dealing with a similar situation, said:
> We are of opinion that there is no justification for charging a higher rate * * * to Mansfield than * * * to Buffalo, Detroit, Cleveland, and Sandusky; and that no evidence has been presented which adequately rebuts the presumption that this higher rate was unreasonable. * * *
>
> *Disposition of the case must, therefore, be determined by ascertaining whether the defendants' evidence is sufficient to rebut the presumption* that the higher rates to the intermediate points are unreasonable under section 1." (Emphasis added)

The Commission then held that the presumption remained unrebutted in numerous instances and the rates were found unreasonable. *Oklahoma* must thus be understood as enunciating the view that, despite the possibility that the rate to the further distant point may be too low, the presumption that attaches to the higher intermediate point rates is such as to require rebuttal and disposition of the case turns on whether the carriers produced evidence sufficient to rebut that presumption.

**(E) Motor Carriers v. Long and Short Haul Anomalies**

Appellants argue that, as section 4 was not incorporated in the Motor Carrier Act, there is no way for the Comission to hold unlawful, long and short haul disparities in motor carrier rates except upon findings of undue prej-

udice (JS 20). This concept of regulatory law is quickly dispelled by the *Patterson* case. That case makes it clear that the effect of a statutory enactment which expressly prohibits rates higher for short than for long hauls is only to restrict the authority of the carrier to initiate such rates. Prior to statutory prohibition, the Court points out, the carriers were "at liberty to introduce the rate without first securing the consent of the Commission." 269 U. S. 1 at 11. The effect of the statute is to require the carrier, upon special application, to obtain authority for the publication of such rates else suffer sanctions for a violation. *Intermountain Rate Cases*, 234 U. S. 476.

The same principles apply under Part II of the Act to motor carrier regulation. But, equally applicable to motor carrier rates, is the rule described by Mr. Justice Brandeis that "apart from statutory enactment, it is *prima facie* unreasonable to charge more for a shorter than for a longer haul". The strength of this rule, and the force of its operation, becomes apparent in a correlative application: even when the Commission grants relief to depart from the prohibition, such rate "are prima facie unreasonable when attacked under §1 of the Act". The Court states that filing an application for relief or even an order granting relief,

> "* * * would not render legal a rate which violated some other section of the Act * * * the Commission is correct in holding, as before stated, that if a through rate higher than the aggregate of the intermediates is attacked under §1, the *prima facie* presumption that such higher through rate is unreasonable, and hence unlawful, obtains now as it did before the 1910 amendment." 269 U. S. 1 at 12.

Thus, whether or not the statute prohibits long and short haul anomalies, such rates are prima facie unjust and

unreasonable. Whether or not the carrier sought or obtained relief by Commission order from the prohibition, complaint could be filed against such rates as unjust and unreasonable and—if such a rate were assailed under section 1—the prima facie presumption that it is unreasonable, and hence unlawful, would apply. The Court's affirmance in *Patterson* of the decisions below refusing damages, was based simply on the fact that departure from section 4 had been authorized and the complaint was based, not on section 1, but on section 4.

The *Patterson* case is instructive here. There is no §4 prohibition in Part II of the Act regulating motor carriers. This only means that motor carriers here—as in the case of rail carriers prior to the 1910 amendment—were "at liberty to introduce the rate without first securing the consent of the Commission". The appellants have done that by publishing their increases which include the border point disparities. But, *Patterson* insists, the chemistry of long and short haul disparities, compounds ingredients of unjustness and unreasonableness. In the words of the Court below, when a rate is higher for a short than for a long haul, this is "so significant an element affecting reasonableness" as to impart the character of prima facie unlawfulness (JS 6a). Unless the carriers defend and justify such rates, the Commission may find them unlawful and direct their cancellation. The Commission found here that the carriers first pleaded no defense and later attempted to defend rate disparities on the ground that other carriers control the rates. This defense was rejected (*supra*, p. 7). The result, under the established rule is, that the presumption of unreasonableness stands unrebutted. The rate disparities must be held unjust and unreasonable.

Appellants pursue a tortuous dialectical course that leads them to this remarkable thesis (JS 21): motor car-

riers are free to transport "at whatever lawful rates they choose" and neither Commission nor Court can require elimination of long and short haul anomalies except where undue prejudice can be found.

Such a view is neither articulated in the regulatory statute nor supported by the cases. The Commission has not condoned it and this Court has never endorsed it. The intricate refinements of pleading and practice that prevailed in 1924 when the *Patterson* case was decided is no longer part of our legal system. The narrow decision in that case that, Section 1 not having been violated, no reparation award may stand—is responsive to procedural elements endemic to that day. The great principle enunciated by that case, placed the imprimatur of Supreme Court approval on a doctrine that has been applied from the earliest days of the Commission's regulation of carriers.[5] It is still the law today.

The court below recognized that the Commission acted within the framework of these principles in holding unlaw-

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5. In its Tariff Circular No. 6-A (20 I.C.C. Ann. Rep. 170), issued shortly after passage of the Hepburn Act of 1906, the Commission announced that "it would be its policy to consider the through rate, which is higher than the sum of the locals between the same points, as prima facia unreasonable, and that the burden of proof would be upon the carrier to defend such higher through rate."

The Mann-Elkins Act of 1910 introduced a prohibition of such rates into Section 4 of the Act where it stands today alongside the long and short-haul clause. The *Patterson* case in 1924 clarified the relation of statutory enactment on the subject to the legal presumption that arose independent of statute. The presumption continues with unabated vigor. Rates higher for short than long-hauls are prima facie unjust and unreasonable and may be assailed under the unreasonableness sections of the Act even though a violation has been cleared under Section 4 by the grant of relief. The *Patterson* principle is firmly imbedded in our jurisprudence and has been consistently followed since that time. *Sun Oil* v. *Central R. Co.*, 301 I.C.C. 558, 560; *Mason Co.* v. *Baltimore & O. R.R.* No. 34233 (unreported) Jan. 1964.

ful the border point disparities and requiring their elimination from the general rate increases otherwise approved. That decision is in all respects correct and no substantial questions survive that merit plenary consideration by this Court.

## Conclusion

The processes of thought that motivated appellants to apply to this Court by direct appeal rather than by petition for writ of certiorari are detailed in the Jurisdictional Statement (JS 8-10). Nothing therein set forth furnishes a reason why this Court whose burdens "are heavy enough, probably heavier than any other Court in the world",[8] should take jurisdiction of a case where no serious legal questions survive the Commission's determination of the issue and the District Court's review of that decision. Appellants state (JS 9): "• • • this Court has no discretion to decline to consider the m[illegible]" of cases coming to it on direct appeal in contrast with certiorari. Appellants appear to view selection of the appeal route as investing their position with a substantiality that, under certiorari, it might not have. It seems appropriate to observe that obligatory review under the direct appeal procedure is not synonymous with notation of probable jurisdiction. Tests of substantiality are essentially the same as under petition for writ of certiorari. The practice is the same on direct appeal as by petition for writ, that a minimum of four justices must be of opinion that the questions presented merit full briefing and oral argument. *Ryton* v. *Price*, 360 U. S. 246, 247.

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5. Appellants' statement in opposition (July 10, 1964) to appellees' petition to include shipper leagues in the enlargement of time granted the government to file response to Jurisdictional Statement.

It is respectfully submitted that none of the questions raised by appellants' Jurisdictional Statement is sufficiently substantial to warrant plenary consideration by this Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

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July 30, 1964

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No. 131

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

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ACCELERATED TRANSPORT-PONY EXPRESS, INC., ET AL.
*Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

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On Appeal From The United States District Court
For The District of Vermont

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## OPPOSITION TO MOTIONS TO AFFIRM

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IN THE

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ACCELERATED TRANSPORT-PONY EXPRESS, INC., ET AL.,
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**On Appeal From The United States District Court For The District of Vermont**

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## OPPOSITION TO MOTIONS TO AFFIRM

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### APPEAL OR CERTIORARI

Appellants' Jurisdictional Statement points out (pp. 8-10) that the difference between an appeal and a petition for a writ of certiorari has fundamental substantive consequences. The summary affirmance of a judgment on appeal is a decision that it is right. In contrast, the denial of a writ of certiorari is only a decision not to consider whether a judgment is either right or wrong. The Motion To Affirm of National

Small-Shipments Traffic Conference, Inc., et al., would have the Court ignore this difference.[1] Their theory is that the tests for the grant or denial of certiorari are the same as the tests for the grant or denial of a motion to affirm, and that this Court therefore need not concern itself with the "processes of thought that motivated appellants to apply to this Court by direct appeal rather than by petition for writ of certiorari." (Motion To Affirm, p. 24).

This assumption that Appellants had a choice between appeal and certiorari is of course false. The only method the Congress has provided for the review of final judgments of United States District Courts of three judges is by direct appeal to this Court. 28 U.S.C. § 1253. Nor are the considerations in determining whether or not to grant certiorari the same as those in determining whether or not to grant a motion to affirm. The basic consideration in granting or denying certiorari is whether there are "special and important reasons" for review by this Court. Rule 19. This is not a consideration at all in granting or denying a motion to affirm. The Congress, in providing for appeals in this class of cases, has already determined that there are "special and important" reasons for review by this Court. Hence the only consideration in granting or denying a motion to affirm is the merits of the case. Thus, as was said in the very case Traffic Conferences cite, *Ohio ex rel Eaton* v. *Price*, 360 U.S. 246, 247 (1959), which they mis-style *Eion* v. *Price*: "Votes to affirm summarily, . . . it hardly needs comment, are votes on the merits of a case, . . ." Appellants

[1] These Intervening Appellees will be hereinafter referred to as "Traffic Confesences." The only other Intervening Appellee in this Court, Lynchburg Traffic Bureau, will be referred to as "Lynchburg."

reiterate what they said in their Jurisdictional Statement and will further show here, that the question whether the order of the Interstate Commerce Commission and the judgment of the District Court sustaining it are right is substantial.

## THE ISSUES AND THE COMMISSION'S RESOLUTION OF THEM

All parties and the District Court agree that Section 216(d) of the Interstate Commerce Act, 49 U.S.C. § 316(d), requires Appellants' rates to meet two separate and distinct criteria, first the criterion of justness and reasonableness, and second the criterion of absence of discrimination, preference or prejudice. All parties and the District Court agree that the Commission found Appellants' rates in issue unlawful solely because it found that they did not meet the first criterion. All parties and the District Court agree that that finding rests on one fact alone, namely, that Appellants' rates in issue are higher for shorter distances than other rates not in issue are for longer distances. The sole question here is whether, on this record, that fact supports that finding.

Traffic Conferences' contention in their Motion To Affirm (pp. 12-14) that Appellants misconceive the Commission's findings is unfounded. The specific issues joined by the evidence were succinctly stated by the Conferences themselves in their brief to the Examiner as follows:

> "(1) the genuiness of the carriers' asserted need for added revenues of 50 to 77 million dollars per annum; (2) the method employed by the respondents to fill their assumed need, specifically the propriety and lawfulness of a method that places virtually the total burden of this added revenue

requirement upon traffic in the lower weight categories; (3) consequential effects on the rate structure of the respondents, with respect to (a) classification relationships, (b) undue prejudice and preference, (c) marketing and economic derangements."

On "the genuiness of the carriers' asserted need for added revenues" the Commission found that their increased rates would produce a ratio of expenses to revenues of 95.6 per cent. (Jurisdictional Statement, p. 20a). Therefore, in accord with its findings "in numerous motor carrier general increase cases" that an operating ratio of 93 per cent is reasonable, it found that Appellants' need for the revenues their increased rates would produce was established. (Jurisdictional Statement, p. 27a).

On the "method employed by the respondents" to fill their need for added revenues and the "consequential effects" thereof, the attack of Traffic Conferences was two-pronged. Their first prong was directed at *all* of Appellants' increased rates on shipments under 6,000 pounds. They said that the imposition of flat increases required those shipments to bear an excessive proportion of the burden of filling the need for added revenues. They argued that those flat increases were "unjust, unreasonable and exhorbitant," that they accentuated an already existing distortion of classification relationships, and that they resulted in "a deranged motor carrier rate structure which fails properly to reflect the relationship of articles of different kinds and which inexcusably interferes with the competitive relations of articles of the same kind." The Commission rejected this attack. In accord with its decision in *General Increases,*

*Eastern Central Territory*, 316 I.C.C. 467 (1962), it found that flat increases are not inherently unlawful despite the consequent distortion of classification relationships and further found that: "Considering the respondents' cost estimates, which are acceptable as fair approximations, we find that the flat increases on shipments of less than 6,000 pounds do not result in rates which exceed reasonable maxima." (Jurisdictional Statement, p. 28a).

The second prong of Traffic Conferences' attack on the flat increases on shipments under 6,000 pounds was directed only at the rates at issue here. They said that "rates higher for short than for long hauls" are *prima facie* unreasonable, and that the "situation as to undue prejudice is even more serious." Relying on the testimony of five witnesses, they asked that the rates in issue here be found unduly prejudicial to shippers in Middle Atlantic Territory and unduly preferential to their competitors in adjacent territories. Notwithstanding its findings that flat increases are not inherently unlawful and that those of Appellants "do not result in rates which exceed reasonable maxima," and notwithstanding its failure to make the requested findings of undue preference and prejudice, the Commission found that the resulting higher rates to border points in Middle Atlantic Territory than to points beyond in adjacent territories "obviously, in accord with prior decisions of the Commission, . . . would be unlawful," that if a carrier chooses to participate in the rates to points beyond it should arrange to maintain no higher rate at intermediate points, and that to the extent "that such maladjustments occur, the increased rates are unjust and unreasonable." (Jurisdictional Statement, p. 28a).

One searches in vain for a basis sound in law and adequate on the record to support these findings. The Commission's statement that higher rates for longer than for shorter hauls are "obviously unlawful" is obviously erroneous. The Commission has approved such rates by granting countless applications for relief from the long and short haul clause of Section 4 of the Interstate Commerce Act, 49 U.S.C. § 4. Equally erroneous is the statement that a motor carrier who chooses to participate in rates to points beyond Middle Atlantic Territory must arrange to maintain no higher rates to points within the Territory. As we discussed in our Jurisdictional Statement (pp. 19-21), Section 4 has no application to motor carriers. Their only duty respecting their rates is to make them just and reasonable and to avoid unjust discrimination or undue prejudice or preference. These erroneous statements cannot support the ultimate finding that the rates in issue here "are unjust and unreasonable" in the face of the specific finding that those rates do not "exceed reasonable maxima."

## THE PRESUMPTION OF UNREASONABLENESS

Appellees apparently recognize that the record will not support the Commission's affirmative finding that the rates in issue are unjust and unreasonable, for they seek to transform it into a finding that Appellants failed to carry their burden of proof.[2] Appellees rely

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[2] Throughout their Motions To Affirm Appellees speak of the Commission's disapproval of the rates "as not shown to be just and reasonable." (E.g., Government's Motion, p. 2). But, as we've seen, the Commission did not find merely that Appellants had failed to show their rates to be just and reasonable, but rather that the rates were unjust and unreasonable. Moreover, its ultimate conclusion, as corrected by its order of February 4, 1964, was not that the rates in issue had not been shown lawful but that they were unlawful.

altogether on a presumption that higher rates for shorter distances than for longer distances are unreasonable. This is not enough. The presumption does no more than place upon Appellants the burden of proof, a burden imposed upon them in any event by Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g).

The fact that gives rise to the presumption, i.e., the fact that rates for shorter distances are higher than rates for longer distances, is not in itself probative evidence that the former are above the zone of reasonableness. This is clear from *Fifth Class Rates Between Boston, Mass. and Providence, R. I.*, 2 M.C.C. 530, 546 (1937), cited at Page 5 of the Government's Motion To Affirm as an example of the Commission's use of the presumption. In that case the Commission invoked the presumption, not to order cancelled higher rates for shorter distances, but rather to order cancelled lower rates for longer distances. Furthermore, as Appellants discuss in their Jurisdictional Statement (pp. 11-12) and Appellees concede, the presumption of unreasonableness is rebuttable. It was rebutted here by Appellants' showing and the Commission's finding that their rates do not "exceed reasonable maxima." *Patterson* v. *Louisville & Nashville R.*, 2 F. 2d 592, 593 (5th Cir. 1924); *Maggioni & Co.* v. *Atlantic Coast Line R.*, 272 I.C.C. 127 (1948).

Traffic Conferences belittle the *Patterson* Case because this Court affirmed it on another ground and therefore had no occasion to pass upon the holding of the Court of Appeals that the presumption of unreasonableness was rebutted. 269 U.S. 1 (1926). (Motion To Affirm, p. 18). But this in no way detracts from the soundness of the holding, or of the Commission's subsequent holding in the *Maggioni* Case. Traffic Conferences seek to distinguish the *Maggioni* Case on the

ground that, since the Commission had prescribed rates higher than those there alleged to be unreasonable, *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932), precluded it from awarding reparations. This, they say, "is manifestly what the Commission meant in *Maggioni* when it spoke of 'a basis recognized as a reasonable maximum by this Commission.'" (Motion To Affirm, p. 19). There is nothing in the Commission's decision to support this proposition. Furthermore, it ignores the fact that in *Maggioni* the Commission not only denied reparations, but also refused to find the rates challenged unreasonable for the future, a finding that the *Arizona* Case did not preclude.

The Government also seeks to distinguish *Maggioni* on the ground that the rates the Commission recognized as reasonable maxima had been prescribed by it. In its view that prescription gave the finding on which it was based some special weight. (Motion, p. 5, fn. 5). This is untenable. It is obviously the finding that rebuts the presumption, not the nature of the order that implements the finding. Hence, the Commission held there that the presumption that higher rates for shorter hauls are unreasonable was rebutted by its finding that those rates did not exceed reasonable maxima. So here, the presumption is rebutted by its finding that Appellants' rates do not exceed reasonable maxima. Of a piece with this untenable argument is the further attempt to distinguish both *Maggioni* and *Patterson* on the ground that the standards of proof are "far stricter" in reparations cases. Assuming *arguendo* that this be true, the fact remains that on this record the Commission specifically found that Appellants' rates do not exceed reasonable maxima.

## APPELLEES' FAILURE TO MEET THE ISSUE

Traffic Conferences' Motion To Affirm, like the opinion of the District Court, fails to come to grips with the issue here. It dwells on the power of the Commission in general revenue cases such as this one. It points out that in such cases the Commission may not only fix a just and reasonable general level of rates, but may also compel adjustments to make particular rates just and reasonable.[8] Appellants do not quarrel with this proposition. However, the question here is not the power of the Commission to order particular rates adjusted, but whether its order requiring particular adjustments finds support in the law and on the record. It cannot be gainsaid that the Commission's order compels adjustments in rates it found just and reasonable solely because of their relationship to other rates not in issue. This is the fatal error the Commission committed. As we discussed in our Jurisdictional Statement, rates that are in themselves just and reasonable cannot be condemned because of their relationship to other rates without a finding of unlawful preference, prejudice or discrimination. This is the teaching of this Court in both *State of New York* v. *United*

[8] Traffic Conferences argue (Motion to Affirm, p. 17) that, while Appellants may have satisfied the requirement that their rates be reasonable, they did not satisfy the requirement that they be just. The short answer is that the Commission did not differentiate between just rates and reasonable rates. And it rejected Traffic Conferences' vigorous argument that Appellants' flat increases on shipments under 6,000 pounds required those shipments to bear a disproportionate share of the burden of meeting Appellants' need for added revenues; an argument that might be said to go to the justness rather than the reasonableness of the increases under investigation. Contrary to Traffic Conferences' contention, the rejection of this argument necessarily constituted a finding that the rates under investigation were properly related to one another.

*States*, 331 U.S. 284 (1947) and *United States* v. *Chicago M. St. P. & P. R. Co.*, 294 U.S. 499 (1935)[4]

## DISCRIMINATION THE IMPROPER BASIS OF THE COMMISSION'S ORDER

What the Commission has attempted here is nothing more nor less than to eradicate discrimination without first determining whether the discrimination is unlawful. This is perfectly clear from the Government's Motion To Affirm. Its whole argument in support of the Commission's order relies on its power to eliminate discrimination. Thus it points out that Section 4 of the Act forbids railroads to establish high rates for shorter hauls than for longer hauls without specific permission from the Commission because "this is a type of discrimination so patent as to warrant specific condemnation." (Motion To Affirm, p. 4). It says that in this case the Commission properly treated "this type of apparent discrimination as requiring justification," and that "appellants were on notice . . . that they would bear a special burden in connection with those aspects of its (sic) proposed rates which would result in lesser charges for longer than for shorter hauls." (Motion To Affirm, p. 5).

The "special burden" to which the Government refers could only be to justify the disparities between the intraterritorial rates in issue and the interterritorial rates not in issue. True enough, the Commission in

[4] Traffic Conferences say that the *New York* and *Chicago* Cases are inapposite because they were rate rather than revenue cases. (Motion To Affirm, pp. 9-10). At the same time they say that the differences between rate and revenue cases are largely those of emphasis. Be this as it may, both cases make plain that the question of the propriety of rate relationships sound in discrimination, not in justness and reasonableness.

two prior proceedings on rate increases in Middle Atlantic Territory admonished the carriers to correct such disparities. But this fact has no bearing on the issue here, which is whether its finding that just and reasonable rates are unlawful because of those disparities is supported by the record. That its finding is not so supported is clear from the *Chicago* Case, *supra*. As this Court there held, before the Commission can do what its order here does, i.e., compel the maintenance of a particular rate relationship, it must undertake "a comprehensive inquiry into [all of] the rates of all of the lines within the area of controversy" in which it can "fix the fair relation . . . and build the structure of the rates accordingly."[5]

Further demonstrating that the criterion of justness and reasonableness was misapplied here in an attempt to eradicate discrimination is the argument of Traffic Conferences at Page 7 of their Motion To Affirm. They say that the self-evident finding that Appellants have control of their individual rates and therefore are able to eliminate disparities "is a determination that the presumption of unreasonableness has not been rebutted." This is not so. The power of a carrier to control its rates obviously has no relevance on the issue of their reasonableness. However, it is well settled that a rate cannot be found discriminatory except in a proceeding in which all of the carriers participating in it are party.

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[5] The Commission having refused to undertake such an inquiry, Appellant Middle Atlantic Conference has instituted one by filing a formal complaint against the carriers, some 1800, participating in the lower interterritorial rates: *Middle Atlantic Conference* v. *A.A.A. Motor Lines, Inc., et al.*, I.C.C. Docket No. 34401, Complaint filed February 24, 1964.

## CONCLUSION

The disparities in rates to which the Commission's order is addressed are neither isolated nor peculiar to Middle Atlantic Territory. There are nine separate motor carrier rate making territories in the United States. There are many disparities between the intra-territorial rates within each of those territories and the interterritorial rates to and from each. As Appellants demonstrated on this record, the problem such disparities present cannot be solved in the way that the Commission would solve it here, i.e., by ordering every individual carrier to adjust its rates, for this would make impossible the maintenance of just, reasonable, stable and practical rate structures.[6] It can only be solved in the way that it was solved by the railroads, i.e., by complementary mutual adjustments in the rate structures of each group of carriers. This is not easily accomplished and cannot be accomplished at all except through the Commission's exercise of its regulatory authority, as its experience in the case of the railroads makes plain. See *State of New York* v. *U. S.*, supra.

However, the difficulty of the task does not justify what the Commission seeks to do here, and, will no doubt seek to do elsewhere if its order is sustained: What it seeks to do here is substitute administrative fiat for findings of fact supported by substantial evidence and conclusions of law correctly applying the

[6] The practical difficulties resulting from the attempt to solve the problem in the way the Commission directed is illustrated by the tariffs filed in compliance with its order. One who ships only from Pittsburgh, Pa. to Richmond, Va., both points within Middle Atlantic Territory, must now examine the tariffs of Middle Atlantic Conference, Southern Motor Carriers Rate Conference and Eastern Central Motor Carriers Association in order to ascertain the applicable rates.

criteria that define and limit its regulatory authority. Regulation by fiat is of course less troublesome than developing a record that will permit adequate findings of fact and the application of correct criteria to them. Nevertheless, this is what the law requires, administrative inconvenience notwithstanding.

Respectfully,

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August 31, 1964

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 131

ACCELERATED TRANSPORT-PONY EXPRESS, INC., ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

**On Appeal From the United States District Court for the District of Vermont**

## SUPPLEMENT TO OPPOSITION TO MOTIONS TO AFFIRM

The purpose of this Supplement is to bring to the attention of the Court the Petition for Suspension filed with Appellee Interstate Commerce Commission by Kingsport [Tennessee] Chamber of Commerce, Inc. on or about August 28, 1964 and reproduced as Appendix hereto.

After the District Court vacated its stay of the Commission's decision the Commission ordered compliance with it on or before June 26, 1964. The carriers' method of compliance was based on the premise that, despite the Commission's formal finding that the intra-

territorial rates in issue were unjust and unreasonable to the extent that they exceeded interterritorial rates, it was actually condemning only what it considered a discriminatory relationship between the former and the latter. The carriers therefore determined to both reduce the intraterritorial rates and increase the interterritorial rates, rather than to reduce the former to the level of the latter. Accordingly, new tariffs were filed by Middle Atlantic Conference, Eastern Central Motor Carriers Association and Southern Motor Carriers Rate Conference.

Those tariffs re-group points south and west of the borders of Middle Atlantic Territory and fix the interterritorial rates at the re-grouped points as maximum intraterritorial rates at intermediate points north and east of the borders. The Petition of Kingsport, protesting the re-grouping in the tariffs of the Southern Conference, illustrates what was done. To remove the disparity between intraterritorial rates at Bristol, Virginia-Tennessee and interterritorial rates at Kingsport, Tennessee, the interterritorial rates at Asheville, North Carolina were made applicable at Kingsport, Tennessee and fixed as maxima at Bristol. As Kingsport points out, the effect is to increase interterritorial rates at Kingsport and deprive it of "its natural geographic advantage" over Asheville, i.e., the advantage of being 84 short highway miles and 134 rate making miles closer to "the major marketing areas in Middle Atlantic territory." (App., pp. 3a, 4a).

The Commission approved this method of compliance with its decision by denying petitions of intervening Appellees here to reject the tariffs of Middle Atlantic Conference and Eastern Central Motor Carriers Asso-

ciation for failure to comply therewith.[1] They took effect June 26, 1964. Those of Southern Motor Carriers Rate Conference are filed to take effect September 21, 1964. This action of the Commission lays bare its error in this case, for it makes crystal clear that it itself recognizes that its finding that the increased intraterritorial rates are unjust and unreasonable is unsupportable. Obviously, if the intraterritorial rates are unreasonably high to the extent that they exceed the interterritorial rates, as the Commission found, the former are not made reasonable by increases in the latter. Yet the Commission has treated increases in interterritorial rates as compliance with its order requiring the establishment of reasonable intraterritorial rates.

We submit that there can be no doubt that what the Commission has attempted is nothing more nor less than to eradicate discrimination without first determining whether the discrimination is unlawful. Moreover, it is eradicating disparities between intraterritorial and interterritorial rates by creating disparities between interterritorial rates. For example, as Kingsport shows, the interterritorial rate between Philadelphia and Kingsport will be higher than the interterritorial rate between Philadelphia and Rogersville, Tennessee, a point 30 miles further south (App., p. 6a).

Kingsport points out that "interterritorial rates were not before the Commission and no consideration was given to cost or a Traffic study between the terri-

[1] The Commission also denied a petition for an order specifically finding that the tariffs of Middle Atlantic Conference were in compliance with its decision. However, since the tariffs depart from the requirements of its regulations under Section 217(a) of the Act governing the "form and manner" of publication, it was necessary that it grant and it did grant special permission to file them.

tories" (App., p. 8a). It also says that "*if* proper cost and traffic studies indicate changes are to be required to solve the border problem, such changes could and should be made in such manner as not to destroy basing point relationships of long standing, natural geographic advantages, et cetera." (App., p. 7a; Emphasis original). We agree. As we said in our Jurisdictional Statement and Opposition To Motions To Affirm, the Commission, having found Appellants' rates just and reasonable in their level and *inter sese*, cannot order them cancelled because of their relationship to other rates without an investigation of both sets of rates and a finding of unlawful preference, prejudice or discrimination. *State of New York* v. *United States*, 331 U.S. 284 (1947); *United States* v. *Chicago, M. St. P. R. Co.*, 294 U.S. 499 (1935).[2] These cases make clear that the Commission cannot *say* that rates fail to meet one criterion for lawfulness in order to avoid *finding* whether or not they fail to meet another.

Respectfully,

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September 16, 1964

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[2] Compare *Seatrain Lines, Inc., et al.* v. *U.S.A. and I.C.C., et al.*, Civil No. 33-62 in the United States District Court for the District of New Jersey, decided September 1, 1964. The three judge court held that the rail rates in issue there *were not* destructively competitive in violation of the National Transportation Policy but *were* unjustly discriminatory in violation of Section 3(4) of the Act.

# APPENDIX

BEFORE THE INTERSTATE COMMERCE COMMISSION

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EFFECTIVE DATE: September 21, 1964

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TARIFF REFERENCE: Southern Motors Carriers Rate Conference, Agent, Supplement 9 (Note 163) to Tariff 500-F, ME-ICC 1286

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COMMODITY: LTL Class Rates
Applicable on LTL or Any Quantity Shipments
Weighing Less than 6,000 Pounds

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TERRITORY: Between Middle Atlantic Territory and Points In Southern Territory Immediately South of Middle Atlantic Territory

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Comes now the Kingsport Chamber of Commerce, Inc., and respectfully petitions the Commission to suspend the schedules described herein for the following reasons.

I

The Kingsport Chamber of Commerce, Inc., is a corporation organized under the laws of the State of Tennessee with offices at 226 Commerce Street, Kingsport, Tennessee. Through appropriate action taken by its Board of Directors, it has authorized the Transportation and Utility Council to file this protest against the proposed increase in rates and to seek an investigation by the Commission.

Your Protestant has a membership of 461 businesses, manufacturing firms, and individuals. The membership receives and ships a large volume of LTL freight by com-

mon carrier motor truck in interstate commerce to and from Kingsport and other territories, including Middle Atlantic territory.

II

The publication here protested proposes to eliminate Kingsport as a basing point on LTL or any quantity shipments weighing less than 6,000 pounds on traffic between this border area and Middle Atlantic territory. Kingsport is assigned to Asheville, North Carolina, as a basing point. The rate making distance between Kingsport and Asheville is 134 miles. This proposal, we believe, would produce the largest rate making group in history. The distance between the extreme points in the group would exceed 125 miles short line distance or 160 miles on rate making route. Such grouping, if allowed to become effective, would produce rates both prejudicial and otherwise discriminatory against Kingsport and its immediate area and would be clearly in violation of the National Transportation Policy, Section 216 (d) of the Act.

In reviewing the tariffs, we find that there is no similarity between the tariffs published by the different territorial agents. Middle Atlantic territory tariff MF-ICC A-1415 provides a weight break on LTL shipments of 2,000 pounds and 6,000 pounds, while SMCRC Tariff 504-B, MF-ICC 1282 provides a weight break of 500 pounds. The protested proposal attempts to apply the Asheville group on shipments weighing less than 6,000 pounds from and to the border points. We can find no place in SMCRC Tariff MF-ICC 1282 where there is any change made in the break-down rates of 500 pounds. One must refer to the Group Guide to come up with any break-down different from the original tariff. Since Kingsport is shown in the class tariff proper, much confusion will result from this publication.

One example will suffice. A shipment is made from Kingsport to a destination in Middle Atlantic territory

weighing 5,000 pounds. In order to determine the correct rate, one would first find it necessary to check the rate from Kingsport to the same destination on 6,000 pounds and then go to the Group Guide and find that Kingsport takes Asheville, North Carolina, basis on shipments weighing less than 6,000 pounds. There he would use his normal break-down based on 500 pounds from Asheville. This results in nothing less than a chaotic rate situation and confusion.

The proposed method of rate making runs against LTL class rates under 6,000 pounds only. However, history dictates to us that if the method of increasing rates through confusion and without justification that we may expect very soon that the Commodity, Commodity Column, and Exception rates will follow.

The National Transportation Policy is specific in condemning preference and prejudice as set out in the following language:

Section 216 (d) of the Act—

> "It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; *or to subject any particular person, port, gateway, locality, region, district, territory or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.*" (Emphasis supplied)

There can be no question but that Kingsport, Tennessee, would under the publication here protested, be robbed of its natural geographical advantage over the Asheville, North Carolina, area with respect to rates between these two areas on the one hand and points in Eastern territory on the other. Kingsport is an industrial city located only

twenty miles south of Bristol. One of Kingsport's most effective tools in its aggressive search for new industries has been its location in relation to the major marketing areas in Middle Atlantic territory. Should the herein protested rates become effective, Kingsport would have its present inherent geographic advantage destroyed.

The current rate basis numbers (Docket 28300 rail rate making miles), as published in SMCRC Tariff 504-B (Eastern-Southern Class), MF-ICC 1282, between Kingsport and Asheville on the one hand and a few representative Eastern basing points are as follows:

| Asheville to | Rate Basis No. | Kingsport to | Rate Basis No. |
|---|---|---|---|
| Baltimore, Md. | 520 | Baltimore, Md. | 467 |
| Boston, Mass. | 928 | Boston, Mass. | 875 |
| Buffalo, N. Y. | 803 | Buffalo, N. Y. | 669 |
| New York, N. Y. | 701 | New York, N. Y. | 648 |
| Philadelphia, Pa. | 608 | Philadelphia, Pa. | 555 |
| Providence, R. I. | 901 | Providence, R. I. | 848 |
| Stamford, Conn. | 749 | Stamford, Conn. | 696 |
| Washington, D. C. | 472 | Washington, D. C. | 418 |

The protested publication would make Kingsport subject to Asheville, North Carolina, as a rate basing point.

Between all other points in Southern territory, outside the scope of the protested publication, and points in Eastern territory, carriers party to Southern Motor Carriers Rate Conference Tariff 504-B, MF-ICC 1282 observe Docket 28300 grouping and rate basis numbers (rail rate making miles). Yet, they here propose to arbitrarily disregard Docket 28300 grouping—and thereby increase rates—between Kingsport and Eastern points by amounts ranging from 46 miles with respect to Washington, D. C. to 134 miles with respect to Buffalo, New York. There may

be even greater increases than 134 if one checked all possible areas of discrimination.

This arbitrary and unreasonable increase of rate basis numbers between Kingsport and Eastern points will cause the Class 100 rates on shipments weighing each less than 500 pounds to increase as follows:

| Between: Kingsport | | *Rates in Cents Per Cwt.* | |
|---|---|---|---|
| | | *Present* | *Proposed* |
| And: | Baltimore, Md. | 377 | 392 |
| | Boston, Mass. | 522 | 545 |
| | Buffalo, N. Y. | 453 | 507 |
| | New York, N. Y. | 445 | 468 |
| | Philadelphia, Pa. | 406 | 429 |
| | Providence, R. I. | 513 | 537 |
| | Stamford, Conn. | 459 | 483 |
| | Washington, D. C. | 354 | 377 |

SMCRC MF-ICC 1282

The carriers are apparently working under what we believe to be an erroneous interpretation of the Commission's order in the Middle Atlantic and New England Rate Case, Docket No. 33652. Here the Commission permitted the carriers to increase rates, giving at least tacit approval, except where the rates to intermediate points exceeded rates to the more distant points. The carriers are interpreting the order to mean that they must adjust the inter-territorial rates south of the border.

In Docket 33652, the Commission in its discussion points out very specifically that the inter-territorial rates are not in issue. In the discussion, the Commission says:

> "A number of instances are shown where the proposed rates are higher to border points within the affected area which are intermediate over the same routes to points outside the area to which lower rates apply. The respondents claim that they are powerless to correct such situations, and suggest that the rates to and from the border points be required as minimum

rates to and from the more distant points. Inter-territorial rates are not here in issue."

And further:

"With respect to resulting higher rates to border points than to points beyond over the same routes, obviously, in accord with prior decisions of the Commission, such higher rates would be unlawful, and we concur in the conclusion of the examiner in this respect that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points. To the extent that such maladjustments occur, the increased rates are unjust and unreasonable."

Protestant recognizes that there are rates within Middle Atlantic territory that are higher at the intermediate border points than to more distant points south of the border.

Nevertheless, if the Commission elects to observe the long and short haul principle with respect to Middle Atlantic and East-South rates, the rates sought to be established under the publication here protested will have to be condemned because, in effect, they only move the "border" which now exists at Bristol, Virginia-Tennessee, southward into Southern territory. Almost countless instances of identical in principle examples could be given, but for the sake of brevity consider the relationship of rates between Kingsport and Rogersville to Philadelphia, Pennsylvania. Rogersville, Tennessee is approximately thirty miles greater distance than Kingsport from Philadelphia. Shown below are the present and proposed Class 100 rates on shipments weighing less than 500 pounds between Kingsport and Rogersville on the one hand and Philadelphia, Pennsylvania on the other:

| | | Present | | Proposed | |
|---|---|---|---|---|---|
| Between: | Philadelphia | Rate Basis No. | Rate | Rate Basis No. | Rate |
| And: | Kingsport | 555 | 406 | 608 | 429 |
| | Rogersville | 566 | 406 | (no change) | 406 |

A "solution" which simply moves a problem a few miles down the road is not a true solution and should be condemned.

IV

Protestant understands why drastic reduction of Middle Atlantic rates from and to points on the border of Southern territory would be just as objectionable and distasteful to the carriers as drastic increase in East-South rates from and to Southern points just below the Middle Atlantic border is to the shippers in the area just South of the border. The carriers would have us believe that they cannot afford drastic reduction in those rates from and to a substantial portion of Middle Atlantic territory just because they exceed rates at more distant points.

Protestant is sympathetic with this position of the carriers, both from the standpoint of recognizing their desire and need for a profit, and from the standpoint of wanting and needing undiminished service from the carriers. Protestant recognizes that its members cannot reasonably expect to continue to receive good motor carrier service if the carriers are forced to maintain rates and charges at a level below a just and reasonable rate.

V

The correct answer must lie somewhere between the extremes of the Middle Atlantic rates which the Commission ordered adjusted at the border and the East-South rates which produce lower charges at more distant points, and, *if* proper cost and traffic studies indicate changes are to be required to solve the border problem, such changes could and should be made in such manner as not to destroy basing point relationships of long standing, natural geographical advantages, et cetera.

Protestant understands that the carriers have already undertaken cost and traffic studies looking toward the end

of "melding" of Middle Atlantic and East-South rates in an orderly fashion. This protested schedule should be suspended to permit the traffic study to be completed as a basis on which remunerative rates may be lawfully made.

## VI

In summary:

1—The carriers seem to have been stampeded into a hasty and ill conceived method of trying to comply with an order of the Commission to change a rate situation which Protestant believes to be unlawful.

2—The hasty method of compliance is unusual and unlawful because the inter-territorial rates were not before the Commission and no consideration was given to cost or a Traffic study between the territories.

3—The carriers have made an honest effort to establish rates within the Middle Atlantic territory in compliance with the Commission's order in general increase—Middle Atlantic and New England territory Docket 33652. (MF-ICC A-1415 and others effective June 26, 1964).

Protestant would urge that the Commission consider the June 26 rates to be in substantial compliance with its order, and that the inter-territorial rates here protested be suspended to permit due process of rate making.

4—If the Commission insists that the border problem be treated, the best interests of both shippers and carriers lie in doing so in a carefully studied and orderly manner which won't be prejudicial to the parties involved.

5—The carriers have advised us they have already authorized cost and traffic studies looking toward a melding of Middle Atlantic and East-South rate struc-

tures to remove the border "hump" in a non-prejudicial manner.

WHEREFORE, Protestant prays that the Commission will suspend the protested schedules and shall enter into a proceedings of investigation to determine the lawfulness of said rates at which proceedings the Protestant will appear if afforded an opportunity to do so, and produce evidence in support of his allegations.

Respectfully submitted,

KINGSPORT CHAMBER OF COMMERCE, INC.

W. E. NEWELL, *President*

TRANSPORTATION AND UTILITIES COUNCIL OF THE KINGSPORT CHAMBER OF COMMERCE, INC.

B. O. RIPLEY, *Chairman*

H. D. MUSICK, *Registered Practitioner before the Interstate Commerce Commission*

226 Commerce Street
Kingsport, Tennessee 37662

Date: August 28, 1964